

**The liability in delict of judges
for wrongs committed in the course of judicial proceedings:**
**An historical analysis of the relative immunity of the South African
judiciary**

Thesis presented for the degree of

DOCTOR OF LAWS

in the Faculty of Law

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by

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"I dreamed, a plaintiff lay hold of me,
and dragged me before the judge's seat;
and yet I myself sat on that seat...".

Judge Adam in H.v. Kleist's
Der zerbrochene Krug, 3. Scene

DHT 40 VANH
1000/1300



Gerard David, *Judgment of Cambyse* (right panel). Bruges, Groninge Museum

PREFACE

This thesis was written from 1996-1998, a large part of which time I spent in South Africa at the University of Cape Town.

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Johann-Dietrich v. Hülsen
Spatzenhof
October, 1998

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LIST OF ABBREVIATIONS

| | |
|----------------------|--|
| A | Appellate Division |
| a | annus |
| A.D. | anno Domini |
| AC | Law Reports, Appeal Cases |
| AD | Appellate Division Reports |
| <i>AHDE</i> | <i>Anuario de historia del derecho espanol</i> |
| AJ | Acting Judge |
| AJA | Acting Judge of Appeal |
| <i>AJCL</i> | <i>American Journal of Comparative Law</i> |
| All ER | All England Reports |
| <i>Annual Survey</i> | <i>Annual Survey of South African Law</i> |
| Art | Article |
| | |
| B & Ald | Barnwall and Alderson's Reports, King's Bench |
| B & S | Best & Smith's Reports, Queen's Bench |
| B.C. | before Christ |
| BCLR | Butterworth's Constitutional Law Reports |
| BGB | Bürgerliches Gesetzbuch |
| <i>BIDC</i> | <i>Biblioteca internazionale di cultura</i> |
| <i>BIDR</i> | <i>Bulletino dell'Istituto di diritto romano</i> |
| <i>Bijdragen</i> | <i>Bijdragen en medelingen betreffende de geschiedenis der Nederlanden</i> |
| Bing (NC) | Bingham's New Cases, Common Pleas |
| Black | Henry Blackstone's Reports |
| <i>BLR</i> | <i>Baylor Law Review</i> |
| Bpk. | Beperk (=Limited) |
| BR | Batavian Republic |
| <i>BSALR</i> | <i>Butterworth's South African Law Review</i> |
| Buch | Buchanan's Reports |
| Burr | Burrow's Reports, King's Bench |
| | |
| c | circa |
| C | Codex Iustinianus; Cape Provincial Division |
| CA | Court of Appeal |
| Cap | Caput |
| CC | Constitutional Court |
| <i>CILSA</i> | <i>The Comparative and International Law Journal of Southern Africa</i> |
| CJ | Chief Justice |
| <i>C.J.</i> | <i>Court of Justice</i> (Records of the VOC's court of justice at the National Archives) |
| <i>CLJ</i> | <i>Cambridge Law Journal; Cape Law Journal</i> |
| <i>CLP</i> | <i>Current Legal Problems</i> |
| CLR | Commonwealth Law Reports |
| C Theod | Codex Theodosianus |
| Cons. | Consilia |
| Co. Rep. | Coke's Reports |
| Cowp | Cowper's Reports, King's Bench |
| CP | Law Reports, Common Pleas |
| CPD | Reports of the Cape Provincial Division |
| Cro Jac | Croke's Reports temp. James I, King's Bench and Common Pleas |
| <i>CWLR</i> | <i>Case Western Reserve University Law Review</i> |

| | |
|--------------------------|--|
| D | Digesta |
| do. | dito |
| Disp. | Disputatio |
| Dist. | Distinctio |
| DRZ | <i>Deutsche Richterzeitung</i> |
| E | Eastern Cape Division |
| East | East's Reports, King's Bench |
| eg. | example |
| ed, eds | edition, editor, editors |
| EDC | Reports of the Eastern Districts Courts of the Cape Colony |
| EDL | Reports of the Eastern Districts Local Division |
| Edw | Edward |
| EG | <i>L'educazione giuridica</i> |
| esp. | especially |
| <i>et seq./ et seqq.</i> | <i>et sequens, et sequentes</i> |
| Exch | Exchequer; Law Reports Exchequer |
| fn / fnn | footnote, footnotes |
| gl. | glossa |
| H & C | Hurlstone & Coltman's Reports, Exchequer |
| Hen. | Henry |
| Hertzog | Hertzog's Reports. Reports of the High Court of the South African Republic |
| Hil. | Hillary term |
| HL | House of Lords |
| HLC | Clark's Reports, House of Lords |
| HSRC | Human Sciences Research Council |
| HZ | <i>Historische Zeitschrift</i> |
| i.e. | id est |
| Iav. | Iavolenus |
| ICJ | International Commission of Jurists |
| <i>ICLQ</i> | <i>International and Comparative Law Quarterly</i> |
| <i>IJ</i> | <i>The Irish Jurist</i> |
| Inst | Institutiones Justiniani |
| <i>IURA</i> | <i>Rivista internazionale di diritto romano e antico</i> |
| J | Judge |
| JA | Judge of Appeal |
| <i>JFCJ</i> | <i>Juvenile & Family Court Journal</i> |
| JP | Judge President |
| <i>JRS</i> | <i>Journal of Roman Studies</i> |
| <i>Juridical Review</i> | <i>The Juridical Review</i> |
| <i>JZ</i> | <i>Juristenzeitung</i> |
| KB | King's Bench; Law Reports King's Bench |

| | |
|----------------------|---|
| L. | Lex |
| <i>Labeo</i> | <i>Labeo, Rassegna di diritto romano</i> |
| <i>LAWSA</i> | <i>The Law of South Africa</i> |
| LC | Lord Chancellor |
| <i>Legal History</i> | <i>The Journal of Legal History</i> |
| Lib. | Liber |
| Liutpr. | Liutprand |
| LJ | Lord Justice |
| <i>LLJ</i> | <i>Lesotho Law Journal</i> |
| <i>LQR</i> | <i>Law Quarterly Review</i> |
| LR | Law Reports; <i>Law Review</i> |
| LT | Law Times Reports |
| Ltd. | Limited |
| | |
| M & W | Meeson & Welsby's Reports, Exchequer |
| <i>MLR</i> | <i>Modern Law Review</i> |
| MR | Master of the Rolls |
| <i>MULR</i> | <i>Melbourne University Law Review</i> |
| | |
| N | Natal Provincial Division |
| n.d. | no date |
| <i>NBLJ</i> | <i>University of New Brunswick Law Journal</i> |
| <i>NJB</i> | <i>Nederlands Juristenblad</i> |
| <i>NJW</i> | <i>Neue Juristische Wochenschrift</i> |
| NLR | Natal Law Reports |
| NPD | Reports of the Natal Provincial Division |
| Nov. | Novellae Iustiniani |
| | |
| O | Orange Free State Provincial Division |
| <i>Obiter</i> | <i>Obiter, Journal of the Law Faculty of the University of Port Elizabeth</i> |
| <i>OJLS</i> | <i>Oxford Journal of Legal Studies</i> |
| OPD | Reports of the Orange River Provincial Division |
| OR | Official Reports. Reports of the High Court of the South African Republic |
| ORC | Orange River Colony |
| OVS | Oranje Vrystaat |
| <i>OZÖR</i> | <i>Österreichische Zeitschrift für Öffentliches Recht</i> |
| | |
| p | page |
| P | President |
| Paul. | Paulus |
| PC | Judicial Committee of the Privy Council |
| praes. | praesumptio |
| Pr. Const. | Prima Constitutio |
| pr. | principium |
| Pty. | Proprietary |
| | |
| QB | Queen's Bench; Law Reports Queen's Bench Division |
| | |
| R. | Rubrica |
| <i>RE</i> | <i>Realencyclopädie der classischen Altertumswissenschaften</i> |
| Reg. | Regula |
| <i>RIDA</i> | <i>Revue internationale des droit de l'antiquité</i> |

| | |
|------------------------|---|
| <i>RISG</i> | <i>Rivista italiana per le scienze giuridiche</i> |
| Roscoe | Roscoe's Reports. Cape Supreme Court Reports |
| s, ss | section, sections |
| SA | South African Law Reports |
| <i>SAJOHR</i> | <i>South African Journal of Human Rights</i> |
| <i>SALJ</i> | <i>South African Law Journal</i> |
| <i>SA Public Law</i> | <i>South African Public Law</i> |
| SC | Cape Supreme Court Reports |
| <i>SCLR</i> | <i>South Carolina Law Review</i> |
| <i>SDHI</i> | <i>Studio et documenta historiae et iuris</i> |
| SE | South Eastern Cape Local Division |
| <i>Simiolus</i> | <i>Simiolus, Netherlands Quarterly for the History of Art</i> |
| Shaw's Rep | Shaw's Reports |
| <i>SLLJ</i> | <i>Saint Louis University Law Journal</i> |
| <i>Stellenbosch LR</i> | <i>Stellenbosch Law Review</i> |
| T | Transvaal Provincial Division |
| Tab | Tabula |
| <i>TICLJ</i> | <i>Temple International & Comparative Law</i> |
| Tit. | Titulus |
| Th | Theses |
| <i>THR-HR</i> | <i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i> |
| <i>TLJ</i> | <i>University of Toronto Law Review</i> |
| TLR | Times Law Reports |
| <i>TLR</i> | <i>Tulane Law Review</i> |
| tom. | tomus |
| TPD | Reports of the Transvaal Provincial Division |
| <i>TR</i> | <i>Tijdschrift voor rechtsgeschiedenis</i> |
| Tract. | Tractatus |
| trans | translated |
| TS | Reports of the Transvaal Supreme Court |
| <i>TSAR</i> | <i>Tydskrif vir die Suid-Afrikaanse Reg</i> |
| Tvl. | Transvaal |
| US | Reports of Cases in the Supreme Court in the United States of America |
| UCT | University of Cape Town |
| Ulp. | Ulpianus |
| <i>VLR</i> | <i>Virginia Law Review</i> |
| VOC | Vereenigde Geoctroyeerde Oost-Indische Compagnie |
| vol. | volume |
| W | Witwatersrand Local Division |
| Wm Bl | William Blackstone's Reports, King's Bench and Common Pleas |
| <i>WLR</i> | <i>Wisconsin Law Review</i> |
| YB | Yearbook |
| ZAR | Zuid-Afrikaanse Republiek |
| <i>ZfGS</i> | <i>Zeitschrift für die gesamte Strafrechtswissenschaft</i> |

ZfRG

ZSS (GA)

ZSS (RA)

Zeitschrift für Rechtsgeschichte

Zeitschrift der Savigny-Stiftung für Rechtsgeschichte
(germanistische Abteilung)

Zeitschrift der Savigny-Stiftung für Rechtsgeschichte
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ABSTRACT

The focus of this thesis is on an aspect of judicial accountability that has not hitherto attracted much attention in South African law: the civil liability of the judiciary for wrongs committed in the course of judicial proceedings. More particularly, the thesis examines to what extent a South African judicial officer may be held liable in delict for infringing the proprietary or personality rights of another – almost invariably a litigant appearing before the judicial officer. The wrongful conduct in question is usually the giving of a judgement without a proper legal foundation (wrong judgement), but it may take a variety of other forms, for example defamation, insult or, less commonly, physical assault.

Since judicial liability is not an invention of the modern constitutional state, but has deep and ancient roots, the investigation is inevitably and essentially an historical one. The thesis traces the development of such liability in Roman law, in early medieval law, in the *ius commune* (i.e., the Italian school of the Glossators and the Commentators), in Roman-Dutch law, in English law, and finally, in the South African *usus hodiernus*. The assessment of the modern South African law is a critical one. The question is asked whether the narrow scope of judicial liability that is presently recognised is an adequate safeguard against abuse of the judicial office, and whether it is compatible with the new constitutional order in South Africa.

The topicality and controversial nature of the subject is evident from the submissions made by the judiciary to the Truth and Reconciliation Commission in October 1997. It is apparent that the judges are suspicious of attempts to make them more accountable for their actions, regarding these as encroachments on their traditional independence. Significantly, it also appears that the threat of civil liability is not one that is taken seriously. The approach adopted in this thesis is that a proper balance needs to be struck between judicial independence and judicial accountability; and that, as history teaches us, civil liability is an essential component of such accountability.

The *modus operandi* adopted in this thesis is to examine the state of development of judicial liability in each successive historical epoch that may be considered an antecedent of the modern South African system. Each chapter begins by sketching the historical context, the

position and status of the judges in the relevant period, and the background developments in the general law of delict. Thereafter judicial liability is examined under three headings: liability for wrong judgements; liability for infringements of personality rights; and procedural aspects and their practical implications.

Liability for wrong judgements involves claims for patrimonial loss, usually under the *actio legis Aquiliae*, and has proved controversial throughout the course of its development. As we shall see, the scope of such liability has been gradually restricted: from strict liability in earlier Roman law to liability only for a deliberately incorrect judgement given with an improper motive in modern South African law.

The reasons for this gradual restriction of liability may be traced to changes in the surrounding legal-political environment. In Republican Rome extensive judicial liability served an essential compensatory purpose: in the absence of the possibility of upsetting a judgement on appeal or review, it afforded the only means of redress for a wronged litigant. With the advent of appeal procedures in later Roman law, this compensatory function of judicial liability tended to be overshadowed by a new aspect: the desire of the emperors to keep their judges in check. This use of judicial liability as an instrument of control continued for centuries, but with the Age of Enlightenment came new ideas about the separation of powers in a modern state, and the need for judicial independence from the executive arm of government. Certainly, in the Netherlands of the seventeenth to eighteenth centuries, it had come to be accepted by most writers that a judge ought not to be held liable for mere negligence; partly because of the availability of an appeal, but also because of the very real difficulties experienced by a largely uneducated lower judiciary in applying the newly received and complex Roman law. In modern South African law, influenced as it has been by English law, the overriding importance attached to judicial independence has resulted in a *de facto* immunity for the judges.

Judicial liability for infringements of personality rights usually involve claims for defamation, assault or for wrongful imprisonment. Since such claims are brought under the *actio iniuriarum*, which has always required deliberate wrongdoing, liability is inherently restricted and has proved far less controversial than liability for wrong judgements.

As regards procedural enforcement of judicial liability, South African law is unique in recognising and retaining a particular privilege that dates back to Batavian times: a person

who wishes to institute an action against a judge must first petition the court for leave to sue. This procedural requirement presents yet another obstacle to a successful claim for damages against a judge. Whether it is constitutional is an interesting question that remains to be tested.

The research on which this thesis is based involved an investigation of both primary and secondary sources of information. As regards judicial liability in Roman law, in early medieval law, in the *ius commune* and in English law, much work has already been done by others, and I have drawn extensively upon the products of their labours. Comparatively little, on the other hand, has been written on judicial liability in Roman-Dutch and in modern South African law, so that in these systems I have perforce had to rely chiefly on primary sources. In the case of the Roman-Dutch law I have been fortunate to have access to the wealth of materials contained in the splendid Brand van Zyl Collection of the Law Faculty of the University of Cape Town. These comprise, *inter alia*, the standard works (most of which have been translated) of the best known Roman-Dutch writers; a large number of less familiar works by the same authors; and an impressive array of works by other contemporary writers of lesser renown.

In the case of the modern South African law of judicial liability, given the lack of any monograph or treatise on the subject, I have based my analysis on the rather meagre case law, seen against the background of the general principles of delictual liability and of the new constitution. Though the cases on the substantive law of judicial liability are few and far between, they represent a veritable treasure chest by comparison with the virtually non-existent cases on the procedural aspects of such liability. My research on those aspects entailed an investigation of the holdings in the National Archives, in the South African Library, and in the Library of the Cape of Good Hope Provincial Division of the High Court of South Africa.

I INTRODUCTION

In the Groninge Museum in the Flemish town of Bruges there hangs a gruesome but breathtaking painting by Gerard David, a famous fifteenth century Flemish artist. The painting, *Judgment of Cambyzes*, was commissioned by the city magistrates of Bruges for display in their beautiful and impressive town hall, which in those days reflected the enormous wealth and prestige of Bruges and which still today attracts multitudes of admiring visitors.

The painting vividly portrays the famous story of how the Persian King Cambyzes punished one of his judges, Sisamnes, for accepting a bribe to give an unjust judgement.¹ The punishment was death: Sisamnes' skin was to be peeled off and cut into strips to make a cover for the seat on which Sisamnes had sat when delivering his judgement. Thereafter Cambyzes appointed Sisamne's son Otanes to be judge in place of his father, with the admonition to remember always on what seat he was sitting.

David used two panels to portray the story. In the background of the left panel we see Sisamnes taking his bribe, and in the foreground his subsequent arrest by the king. In the right panel, we see Otanes sitting on the judgement seat around which is wrapped his father's skin; but our attention is inexorably drawn to the front scene where, under the watchful eye of Cambyzes a grimacing Sisamnes is being flayed by three grim-faced executioners, one of whom has a knife clenched between his teeth.

Although David's *Judgment of Cambyzes* is a particularly chilling example, the practice of displaying such exemplars of justice in town halls and courts was a common one in the Netherlands in the fifteenth to seventeenth centuries.² According to Van der Velden, such exemplars

¹ The right panel of the painting is displayed above at page iv. The oldest source of this story appears to be Herodotus, *Historiae*, 26-27.

² See for a detailed discussion Van der Velden, *Simiolus* 23 (1995), I and II. Also Van Miegroet, *Simiolus* 18 (1990). I am indebted to my mother, Mrs. Gita Maria v. Hülsen, for the patience with which she gave me her professional support in regard to the historical research in Dutch and Belgian libraries as well as for her valuable comments.

“... served as graphic illustrations of the impartial dispensation of justice for everyone who entered the buildings of the civic authorities. They were therefore designed for people from all walks of life, ranging from the administrators and judges who were responsible for enforcing the laws, to the ordinary townspeople who were bound to respect them.”³

Of the very many judgement scenes depicted in these *exempla justitiae*, that of Cambyses is amongst the most common.⁴ The conclusion is inescapable that the city fathers felt the need not only to emphasise that impartial justice was administered in their courts, but also to remind judges that harsh consequences were in store for those who abused their high office.

The problems associated with abuse of judicial office – how to safeguard against it, and how to deal with the judge who commits the abuse – are, of course, not limited to the late medieval age of Gerhard David, but are almost as old as the law itself. As this thesis will demonstrate, they are problems that have occupied the minds of jurists, monarchs and politicians throughout the centuries. Even to this day, Juvenal’s famous question: “*Quis custodiet ipsos custodes*” retains its relevance.⁵ In modern democratic societies it is not only expected, but almost taken for granted, that judges will base their decisions on a proper application of the relevant laws and legal principles, putting aside their personal whims, fancies and predilections. Not without reason is justice symbolised by a blindfolded Justitia holding aloft her scales before the courts.⁶ Unfortunately, however, today no less than in the past, the ideal is not always realised in practice.

In more recent times, and especially in South Africa, the issue of judicial accountability has tended to be overshadowed by that of judicial independence. The need to secure the independence of the judiciary from interference or control by the other branches of government is undoubtedly of the utmost importance in the modern state; indeed, it has been described as an ‘axiom of democratic political philosophy’.⁷ Judicial independence must

³ Van der Velden, *Simiolus* 23 (1995) I, 52.

⁴ Other biblical themes include the Last Judgement (Apocalypse 6,10); and the Judgement of Salomo (Book of Kings I 3,16-28); the story of Esther and Ahasuerus (or Ahaschwerosch or Artaxerxes = Xerxes I (486-465 B.C.) in Book Esther 7,1-10); Susanna and Daniel (Book Daniel 13,1-64) or the more secular histories of the legends of Trajan or Herkinbald and Zaleucus. See also Van der Velden, *Simiolus* 23 (1995) I, 6-7; Van Miegroet, *Simiolus* 18 (1995), 117 for further references. With regard to the Judgement of Salomo see Schild, *Urteil des Königs Salomo*, 281 *et seqq* and for the Last Judgement Scheffczyk, *Gericht, Jüngstes*, 1327.

⁵ *Satira*, vol. VI 347.

⁶ With regard to Justitia’s image in the allegory see *inter alia* Windisch, *Im Zeichen der Waage*, 1069-1087 and Köbler, *Bilder*, 139

⁷ Bamford, *SALJ* 73 (1956), 380. See also Andrews, *South Africa*, 286-313; Motala, *CILSA* 24 (1991), 285-314.

however be balanced with judicial accountability, as many South African commentators are belatedly appreciating when contemplating the role played by their judiciary in propping up the system of apartheid.

The need for judicial accountability is all the more evident when one considers the impressive power wielded by the judiciary. Viewed from the perspective of the individual in society, the conduct of a judge can have very severe consequences for his or her rights to liberty, property, personality and – in some systems, including South Africa’s until very recently – even to life. Provided the judge adheres to the law in exercising this considerable power, there can be little or no cause for complaint; but when the law is disregarded, and the individual’s rights are trampled upon, the need for some form of control is clear.

What form that control might take depends to a large degree on the values and norms of the society or legal system in question. In a fascinating article Professor Max Rheinstein has identified the various mechanisms that exist to secure observance of the law by the judiciary, and has classified them as either internal (idealistic) or external (institutional).⁸ Internal forms of control centre upon the religious beliefs and ethical norms of a particular community, which can exert a very strong influence on the behaviour of judges in that community. They might also include the training of judges in such a way that the making of a judicial decision becomes almost a conditioned reflex: shades of the so-called *Begriffsjurisprudenz* of the nineteenth century German historical school⁹, and its successor, the pandectists.¹⁰ Such a quasi-mechanical application of the substantive law¹¹ holds little attraction today, however,

⁸ To his credit, Professor Max Rheinstein in his fascinating article *Who Watches the Watchmen?* was one of the first legal authors to scrutinise these various mechanisms that exist to secure observance of the law by the judiciary. It has to be acknowledged that this thesis was widely inspired by Rheinstein’s essay. But there have been other contributions, too. South African contributions are for instance Labuschagne, 1993 *De Jure*, 347-362; Corder, *SA Public Law* 7 (1992), 181-193. Further Cameron, *SAJOHR* 6 (1990), 251-265 and *Judicial Accountability*, 181-199 or Rautenbach and Malherbe, *Constitutional Law*, 234-236.

⁹ Chief representatives of these schools of thought were *inter alia* von Savigny, Puchta and Windscheid.

¹⁰ With respect to the development of the historical school see De Vos, *Regsgeskiedenis*, 114-123; Van Zyl, *Geskiedenis*, 250-254 and further 257-260; Wesenberg and Wesener, *Privatrechtsgeschiede*, 170-180 and 182-188 together with excellent bibliographical annotations. Note also Kelly, *Western Legal Theory*, 320-328 with regard to the historical school and 358-365 for details as to the free law movement and sociological jurisprudence. For the relevant development in the USA see especially the work by Reimann, *Historische Schule und Common Law*, 250-270.

¹¹ Compare in this regard the programmatic title of Regina Ogorek’s work: *Richterkönig oder Subsumtionsautomat?* See Ogorek, *Richterkönig* for details.

and is increasingly viewed as quite unrealistic in view of the creative role necessarily played by judges in developing the law. Conceptual jurisprudence has to a large extent been supplanted by *Interessenjurisprudenz* and by American realism.

External or institutional mechanisms of control may take many forms. These include *inter alia* the requirement of publicity (of judicial proceedings, of judicial decisions and of the law itself); the possibility of taking the decision of a judge on review or on appeal (apart from correcting initially wrong decisions, frequent reversals may be damaging to a judge's pride, reputation or prospects of promotion); an overriding power on the part of the executive or head of state to grant clemency; various types of sanctions (eg., disciplinary measures such as impeachment and removal or suspension from office; and even criminal liability in suitable cases, eg., bribery) and finally, the possibility of civil liability.¹²

The latter is the concern of this thesis. Professor Rheinstein has described the civil liability of the judiciary as

“... one of the most effective institutional devices ever applied to establish the judicial duty of strict law observance as a principle of government. Its importance in the historical development of a rule of law has been little investigated, but can hardly be overestimated.”¹³

One of the main aims of this thesis, at least to some extent, is to make good that deficiency by tracing the civil liability of a judge for wrongs committed in the course of judicial proceedings back to the days of the early Roman republic. There are indications, however, that such liability dates back to much earlier times, and was amongst the very earliest means of judicial control: the historical sources indicate that as early as 3700 years ago the Babylonian king Hammurabis enacted regulations by which judges could be held civilly liable.¹⁴

A survey of modern legal systems reveals various possible approaches to the issue of civil judicial liability. Some systems recognise direct state liability for the wrongs of judges: since judges exercise a public function in adjudicating as an organ of the state, and receive remuneration from the state, it is felt by some that the responsibility to pay damages to the

¹² More specifically on the aspect of judicial liability as a means of judicial accountability see *inter alia* Cappelletti, *AJCL* 31 (1983), 1-62 and Labuschagne, *THR-HR* 59 (1996), 479-485.

¹³ Rheinstein, *Who Watches the Watchmen*, 7.

¹⁴ In § 5 of Hammurabis's famous law book one can read that a judge who disregarded Hammurabis's decisions had to be sentenced to the payment of twelve times the value in dispute and dismissal from office. See Wagner, *Der Richter*, 35.

party injured by judicial misconduct should rest directly on the state itself. Alternatively, the state might be held vicariously liable for the wrongs of its judges, in systems where the judge is considered to be an employee of the state. A third and more sophisticated option, employed for example in Germany, is to impose vicarious liability on the state but with a right of recourse against the judge.¹⁵ The benefit of such a system is that it combines a sure right to compensation (as some sort of socialisation of risk) with both judicial accountability and freedom from harassing legal actions. Finally, there is the possibility of holding a judge personally liable in delict to compensate the party for the harm caused by the wrong.

As we shall see in a subsequent chapter, the model chosen by South African law is the latter one: direct, personal liability of the judge. In principle, though rarely in practice, a judge might be sued under either of the two main delictual actions: under the *actio iniuriarum* for defaming a party or for invading his or her personality rights in some other way (eg., insult, deprivation of liberty); and under the *actio legis Aquiliae* for patrimonial loss wrongfully and culpably caused (eg., for economic losses flowing from a misjudgement or, less likely but not impossible, as an American case shows, from a physical attack upon the party).¹⁶ As we shall see, in order to protect the judiciary against such claims, the circumstances in which a claim will be allowed have been very narrowly defined – too narrowly, in my respectful submission – with the result that the prospect of liability exists more in theory than in practice. Indeed, since there is not a single reported case since 1652 of a superior court judge being held liable in delict, the judiciary appears to enjoy a *de facto*, albeit not a *de jure*, immunity from such claims, quite unlike the position in earlier times.

This thesis sets out to trace the historical development of civil judicial liability in delict in South African law and to critically examine the present state of the law in this regard. The historical investigation begins with Roman law and then proceeds to each succeeding epoch that may be considered an antecedent of the mix that is modern South African law: early medieval law, medieval Italian law as depicted by the Glossators and Commentators, Roman-Dutch law, and English law. The development of judicial liability in English law overlaps in time with many of the other developments, and is included not merely for purposes of

¹⁵ According to § 839 II Bürgerliches Gesetzbuch (BGB) together with Art 34 Grundgesetz (GG). For a detailed comparative analysis of various models of judicial liability reference should be again to Cappelletti, *AJCL* 31 (1983), 1 and Barth, *CWLR* 27 (1976-77), 727.

¹⁶ *Gregory v Thompson* J 500 F. 2d 59 (1974).

comparison, but because it has exercised such a marked influence on the modern South African law.

Each chapter begins with an introductory part which outlines the position and status of judges in the epoch under consideration. This is followed by a brief assessment of the relevant developments in the law of delict. Attention is then focused on the various aspects of judicial liability that merit consideration: liability for defamation, for wrongful imprisonment, and for wrongful misjudgement; and procedural questions relating to the assertion and enforcement of judicial liability. Where it seems to be necessary, the introductory part is preceded by a general discussion of the relevant historical context.

“The judge rules over the souls with his soul...”.

(Plato¹)

II ROMAN LAW

1 THE POSITION AND STATUS OF JUDGES WITHIN THE ROMAN ADMINISTRATION OF JUSTICE

1.1 Early development

The system of Roman civil judicial liability was inextricably interwoven with or, rather, was determined by two aspects: first the development of the Roman system of proceedings and secondly the selection, training, functions and authority of the Roman judiciary. While the first aspect will be given priority in the main part of this chapter, the second should have our attention first. Undoubtedly, the Roman judiciary was subject to dramatic changes throughout its history. It is no exaggeration to state that at the beginning of the Roman empire the Roman judiciary had nothing in common with the Byzantine judiciary of the sixth century A.D. However, when one remembers that Roman legal history covers more than 1 200 years, this statement loses some of its force.

The earliest manifestations of judicial office in Roman law are obscure and have been the subject of intense debate.² What is clear is that by the time of the famous XII Tables (449 B.C.), court proceedings had generally become bipartite.³ This form of proceedings formed the

¹ My translation of *Der Staat*, 123.

² For an overview see most recently Kaser and Hackl, *ZPR*, 27-34. For the purposes of this thesis we will follow the accepted (although not uncontested) division of Roman history into the Regal period (753 B.C. - 507 B.C.), the Republic (508 B.C. - 23 B.C.), the Principate (24 B.C. - 284 A.D.) and the Dominate (285 A.D. - 476 A.D. [west] and 565 A.D. [east]). Not completely congruent with this classification is the classification into the so-called post-classical period that will be contrasted with the pre- and high-classical period of Roman law which lasted from mid-Republican days to about the year 200 A.D.

³ This derives from the fact that the XII Tables already provided for a certain form of procedure before an elected judge who was distinct from the magistrate, namely the *legis actio per iudicis arbitrive potestatem* for various actions. Further,

basis of developments in the following 600 years. In the preliminary stage, a party was required not to seek judgement from a judge, but to approach a member of the Roman superior magistracy, initially probably one of the *consules*, in order that this officer could decide whether or not there had been an actionable wrong (proceedings *in iure*). Only at the second stage did the parties come before a judge whom the parties were free to select for determination of the outcome of the lawsuit (proceedings *apud iudicem*).⁴

It has been debated whether the bipartite system formed the base of the initial form of (civil) proceedings at Rome or whether this was itself the result of a process of refinement. Those who argue in favour of the former say that the foundations of bipartition have to be seen in originally private arbitration agreements entered into by litigants independent of any state control. Using the authority of public magistrates to reinforce the forms, i.e., the procedures as well as the results which had already been determined by purely private agreement, was a further development.⁵ Hence, so it is argued, private arbitration came under the control of the state only in the formative period of the pre-Republican state, and rested on an essentially contractual foundation.⁶

On the other hand, the view is held that already during the reign of the kings, that is prior to 507 B.C., when a revolt drove the last Etruscan king out of Rome, all jurisdiction was, without exception, combined in the hands of the king. Only under the penultimate king, Servius Tullius, or so goes the tradition⁷, was the bipartite system introduced into the early monarchy and, later, into the Roman Republic.⁸ Again, much ink has been spilled in trying to explain the reasons for this step. One attempt at interpretation sees the emergence of the Roman bipartite system as an antiquarian forerunner of Montesquieu's doctrine of the separation of powers,

there was reference to *dare iudicem* or *arbitrum* (Tab. IX.3 and XII.3). See Liebs, *RR*, 30; Kaser, *TR* 32 (1964) 348 and 357; Broggin, *Iudex Arbitrarius*, 9-10, 16-17, 59 fn23, 83 fn94 and 85 fn101.

⁴ For a more detailed account of this system of proceedings see below at 2.2.

⁵ Dawson, *Lay Judges*, 23.

⁶ Steinwenter, *Iudex*, 2464-2471 and *Zum Artikel Iudex*, 350-356; Wlassak, *Römischer Provinzialprozeß*, 12 *et seqq* as well as his *Judikationsbefehl*, 247 *et seqq*; Düll, *ZSS (RA)* 54 (1934), 98 *et seqq* and *ZSS (RA)* 55 (1935), 9 *et seqq*.

⁷ Dionysios, *Antiquitates*, 4.25. For more details as to Dionysios of Halikarnassos' *Antiquitates* see Ogilvie, *Frühes Rom*, 22-23.

⁸ Van Warmelo, *Principles of Roman Civil Law*, 272; Jolowicz, *Roman Law*, 179-180; Liebs, *RR*, 17; Wenger, *Institutionen*, 21; Kaser and Hackl, *ZPR*, 33 fn50; Kaser, *TR* 32 (1964), 336-338; Humbert, *Iudex*, 632; Broggin, *Iudex Arbitrarius*, 24 *et seq* and 54 *et seq*.

and takes this democratic ideal as the underlying force.⁹ The elected judges in a sense represented the people of Rome and, thus, were able to make a decision independent of state authority.¹⁰ A second opinion sees the reason for bipartite development in an attempt to relieve the monarch of excessive administrative work resulting from the inevitable increase in litigation with the growth of the state. In consequence the kings separated the most time-consuming parts of the proceedings, especially the hearing of evidence and preparing of the judgement, and delegated these to other judges.¹¹ Finally, it has been suggested that the introduction of the bipartite system was based upon the idea of guaranteeing the parties a fair trial. By leaving it up to the parties to decide on the person who was to conduct the lawsuit, blaming the judge for an unjust decision was avoided.¹² Undoubtedly, this was an effective means of ensuring peace in the community in Rome, which at that stage of development was still a small town and easily surveyed.

In any case, there will always be considerable uncertainty as to the true foundations of the early Roman judiciary and the introduction of the bipartite system.¹³ Development from the middle of the fourth century B.C. onwards offers far safer ground.

1.2 The *praetor*

As indicated above, a party to a dispute had first to turn to a magistrate in order to initiate a legal action. The magistrates were the highest officials in the *res publica*. They were elected and granted *imperium*, general authority to command, for one year. From the early fourth century B.C., the superior magistrates were referred to as *consules*.¹⁴ Subordinate to the *consules* were another group of officers (*minor collega consulum*). It is known for certain that from the year 367 B.C. the *consules* lost to the so-called *praetor* their judicial office

⁹ With regard to Wenger's view see Dawson, *Lay Judges*, 24-25, further Kaser's commentary in *TR* 32 (1964), 331; Jolowicz, *Roman Law*, 180 fn4.

¹⁰ Kaser, *TR* 32 (1964), 332 fn4 with further references.

¹¹ This view was favoured by Kaser in *Ursprung*, 115-116.

¹² Kaser, *TR* 32 (1964), 344; Köbler, *Bilder*, 22.

¹³ Dawson, *Lay Judges*, 26

¹⁴ With the introduction of the so-called consular constitution under the *leges Liciniae Sextiae* 367 B.C.

(*iurisdictio*), which up to that time appears to have been part of their general *imperium*.¹⁵ Other minor members of the magistracy did not hold *imperium* but *potestas* (for instance the so-called *quaestores* or the *aediles*), which was a more restricted kind of official authority that related exclusively to the specific office held.¹⁶

The office of the Republican *praetor* was, in fact, merely a stepping stone to the highest political and administrative office, the consulate.¹⁷ Prior to the year 337 B.C., only patricians were eligible for the office of *praetor*.¹⁸ Thus, it was not competence that was decisive in the selection of the *praetor*, but descent, prestige and being well-connected. It appears then that although the *praetores* might have been political professionals, they were certainly not legal professionals; in other words they were laymen.¹⁹ It is little wonder, thus, that they secured for themselves legal advisers. From the day of the XII Tables, the *praetor* was advised and assisted by a *consilium* which was staffed by the priesthood (*sacerdotes publici*) of the so-called *pontifices*, who were also exclusively of patrician descent.²⁰ Only at a later period were these advisers ousted by secular professional jurists.²¹

¹⁵ It appears that initially the *consules* were called *praetores* (*prae-rire* = to go ahead, which had the original meaning of commander-in-chief or strategist (characteristically in Greek: *strategos*) or even *iudex* which indicates that the general *imperium* contained all these military, administrative and legal competencies. Later, the title *praetor* was revived under the *leges Liciniae Sextiae* as the title of the magistrate occupied with the administration of justice. See Jolowicz, *Roman Law*, 43-48; Van Warmelo, *Principles of Roman Civil Law*, 5; Van Zyl, *Roman Private Law*, 15-19 and 365; Kaser and Hackl, *ZPR*, 37-39; Hattenhauer, *ERG*, 63-65; Ogilvie, *Frühes Rom*, 91-92; Mommsen, *RG*, 75; Liebs, *RR*, 18 and 24-25. A comprehensive study has been provided recently by Kunkel and Wittmann, *Staatsordnung*, 21-28.

¹⁶ See Kaser and Hackl, *ZPR*, 172-174; Van Zyl, *Roman Private Law*, 19-21; Hattenhauer, *ERG*, 65.

¹⁷ Dawson, *Oracles*, 105.

¹⁸ Derived from *pateres* = Fathers. These were members of the early Roman nobility who constituted the senate. Only in consequence of the struggle of the lower orders, were non-patrician families granted seats in the Senate and eligibility for the magistracy. See Jolowicz, *Roman Law*, 7-10; Borkowski, *Textbook*, 4-5; Van Zyl, *Roman Private Law*, 5-6; Kunkel, *RG*, 29-31 for details.

¹⁹ Liebs, *RR*, 31; Dawson, *Oracles*, 105.

²⁰ See generally Schulz, *Römische Rechtswissenschaft*, 7-116; Kunkel, *Juridical Review* 66 (1954), 155-157 and *RG*, 24, 33-34 and 90-92; Dawson, *Oracles*, 107-108; Van Zyl, *Roman Private Law*, 35-36; furthermore Kaser, *TR* 32 (1964), 353-354; Liebs, *RR*, 26-31.

²¹ Kunkel, *RG*, 92.

The term *pontifices* derives from *facere*, to make, and *pons*, bridge. In other words, these priests were builders of bridges²² in the sense of persons who showed the way and who consequently were in charge of various kinds of ‘traffic’, i.e., sacral communication with the Gods (*ius sacrum*) which *inter alia*, entailed setting the calendar that regulated the *dies fasti* (court days), as well as legal communications.²³ Success in both religious and legal matters depended on the appropriate use of words and formal rites. It was exclusively the priests that were called upon for the appropriate forms of procedure, the method of framing valid legal transactions or the rules of legal interpretation. The *pontifices* developed generally applicable formulae in accordance with Roman custom and early Roman legislation, i.e., the famous XII tables, for the successful performance of these sacra-legal acts.²⁴ These acts came to be known as *legis actio*.²⁵ The original form of the Roman civil law of procedure became thus the *legis actio* forms of procedure.

The court of the *praetor* was held in the open air on certain days and certain hours, as fixed by the *pontifices*. Initially, the court was situated in the *comitium* in front of the *curia* at the northern end of the *forum Romanum* across from the *Basilica Julia*.²⁶ It was only from about 80 B.C. that the court was relocated to the south-eastern end, directly between the *regia* and the temples of Vesta and Castor. The *praetor* was seated on his *sella curilis* on a wooden paladium which was about 1m high and large enough to accommodate his advisory staff (*consilium*). The parties to the action appeared before the *praetor* on the ground level; beyond them was the gallery for interested spectators. No walls, doors or railings separated the court

²² The *pontifices* were in charge of the bridge over the River Tiber in the course of the *via salaria* which was of importance for the expansion of Rome’s sphere of influence throughout Italy. See Liebs, *RR*, 27. Contra Bretone, *Geschichte des römischen Rechts*, 82.

²³ Schiavone, *Der Jurist*, 102; Bretone, *Geschichte des römischen Rechts*, 82 and 83: “Die Pontifices kümmerten sich aber nicht nur dort, wo in irgendeiner Weise das Handeln der Menschen die göttliche Sphere berührte, sondern sie griffen auch als Deuter und Ratgeber in alle Gebiete und Winkel des juristischen Lebens ein.” Further Dawson, *Oracles*, 107.

²⁴ Schiavone, *Der Jurist*, 102-103.

²⁵ One possible etymological interpretation of *lex* is rite. See Schmiedlin, *TR* 38 (1970), 367-387 and Bretone, *Geschichte des römischen Rechts*, 395. See also Kaser and Hackl, *ZPR*, 34-37 and Van Zyl, *Roman Private Law*, 368. Schiavone, *Der Jurist*, 101 makes the point that the profound association of magic, religion and *ius* in early Roman law undoubtedly led to the development of the first spiritual and physical ‘public sphere’ in Roman history. However, Roman priests were not fancy oracles like the Delphi oracle, but more like sacral and legal experts or technicians. See Bretone, *Geschichte des römischen Rechts*, 82.

²⁶ Kaser and Hackl, *ZPR*, 43 fn46 and 47. For details, with further references and a helpful map, see also Frier, *Roman Jurists*, 57-63; and Kunkel, *ZSS (RA)* 85 (1968), 320-329; Wesel, *Geschichte des Rechts*, 175. See also Neumeister, *Das Antike Rom*, 65 and 75 fn13 as well as Hülsen and Carcopino, *Forum Romain*, 58-66.

from the life on the *forum*. It was truly a public hearing. The parties made their statements of facts on oath before the *praetor*. In so doing, they were obliged to follow slavishly the prescribed formulae that applied to the particular cause of action. The slightest deviation from the formula caused the party to lose his case immediately.²⁷ This formal hearing determined the issue. In the next phase, the issue thus determined was delegated to a judge who, after hearing evidence, gave the final judgement.

In keeping with this sacral-mystical transfiguration of the legal sphere, the *pontifices* concealed the whole set of formulae well until the early third century B.C. Hence it was neither the *praetor* nor, as we will see, the *iudices*, but the *pontifices* who for centuries were the wardens of the grail of legal knowledge.²⁸ However, from about the third century, the extremely formal *legis actio* forms of procedure were slowly replaced by more flexible and informal procedures, while the *pontifices* were deprived of their autocracy and the door gradually opened to a demystified, secularised and independent legal science.²⁹ This modified form was the so-called formulary process. It was no longer based on the reproduction of fixed formulae but, generally, on an informal hearing of the parties. It was now that the *praetor* gained a crucial position since it was up to him (by means of new formulae) to extend the protection of the law to cases where a *legis actio* was not available to a party. Hence, the *praetores* began to modify the ‘old’ law (so-called *ius civile*) by a *ius honorarium*.

In due course, on the day of their assumption of office each year, the *praetores* published in the *edicta perpetua* the formulae that were to have validity during their terms of office. With the *lex Iulia iudiciorum privatorum* (17 B.C.), it was mainly the strict formulae of the *legis actio* that fell into disuse. However, bearing in mind that the praetorship always remained a political office staffed by laymen, it is obvious that this creative momentum of the *ius*

²⁷ See particularly Jolowicz, *Roman Law*, 181-182.

²⁸ Schiavone, *Der Jurist*, 104 refers to the overlapping of magic-religious activities and legal activities in the days of the early Republic, which led to the stabilisation of both functions. See also Dawson, *Oracles*, 107; Bretone, *Geschichte des römischen Rechts*, 82.

²⁹ Two essential reasons for this development were the publication of the *pontifices*’ secret list of formulae in the famous *ius Flavianum* (304 B.C.) and the fact that in consequence of the *lex Ogulnia* (about 300 B.C.) plebeians became eligible for the office of *pontifex*, which opened up the closed ranks of this priesthood. By the last century B.C., jurists of aristocratic descent were replaced by members of other classes of Roman society. See Van Warmelo, *Principles of Roman Civil Law*, 13-14; Van Zyl, *Roman Private Law*, 35-36; Kunkel, *RG*, 90-92.

honorarium was hardly the result solely of praetorian creativity. Rather, it was indicative of the influence of the *consilium*, which continued to advise the *praetores* in all legal matters.³⁰

1.3 The *iudex*

We turn now to the judges as the second branch of the legal proceedings during the Republic. Roman law encompassed the single lay judge, commonly referred to as *iudex* or *iudex privatus* or *iudex unus*³¹, who tried exclusively civil litigation, as well as benches of lay judges, the so-called *recuperatores* (in civil matters, 3-5 judges) and the *questiones* (in criminal matters, several dozen judges). This superstructure applied in Rome as well as in the provinces. Since we do not have detailed knowledge of civil liability of members of these multi-member courts, in what follows the focus will be on the single *iudex*.³² Here the sources are richer and, in any case, most civil cases were brought before the single *iudex*.³³

All judges, those sitting alone as well as those from the benches, were drawn from a list of judges, the so-called *album iudicum selectorum*.³⁴ At Rome, the *iudices* of the album, like the *praetor*, initially were exclusively members of the Senate. Thus, in the early Republic it was essentially the patricians who controlled the administration of justice: *praetor*, *pontifices* and *iudices* were all drawn from the exclusive group of Roman aristocrats.³⁵ From the days of the Gracchi, however, the album became the source of discord between the Senate and the rising knights (*equites*). From the day of the radical *lex Sempronia* (122 B.C.), only knights became

³⁰ Van Warmelo, *Principles of Roman Civil Law*, 14; Brogini, 1962 *NJW*, 1651.

³¹ For more details on the terminology see Kelly, *Civil Judicature*, 112-117; Kaser and Hackl, *ZPR*, 48 fn21, further 192-201; Thür and Pieler, *Gerichtsbarkeit*, 369-371.

³² Above that it may be questionable in what way an unsatisfied litigant was supposed to sue a full bench of *recuperatores* or even less likely the judges of the *questiones*. Similarly today there applies no liability to the members of a jury, eg. in the United States for a wrong judgement.

³³ Thür and Pieler, *Gerichtsbarkeit*, 370: "...nahm das Verfahren vor dem Einzelrichter im Formularprozess die Stelle des ordentlichen Rechtsweges ein." See also Kaser and Hackl, *ZPR*, 192.

³⁴ Thür and Pieler, *Gerichtsbarkeit*, 373-376; Dawson, *Lay Judges*, 15-20.

³⁵ Borkowski, *Textbook*, 60; Frier, *Roman Jurists*, 199; Dawson, *Oracles*, 107-108; Kaser, *RPL*, 405; Van Zyl, *Roman Private Law*, 366 fn10; Jolowicz, *Roman Law*, 181 fn1; Kaser and Hackl, *ZPR*, 49; Kaser, *TR* 32 (1964), 355; Brogini, 1962 *NJW*, 1651. Or as De Zulueta, *Institutes*, 225 puts it: "For us the notable point is that the *album iudicum*, from which the *iudices*...were chosen, was at all times confined to the well-to-do."

eligible for judicial office.³⁶ Thus, for 41 years, until Sulla's compromise *lex Cornelia iudiciaria* (81 B.C.), members of senatorial families were excluded from the *album*.

However, the Senate's re-established privileges lasted for a mere eleven years. In 70 B.C., the *praetor* L. Aurelius Cotta proposed an act which came to be known as the *lex Aurelia*. According to this act three groups composed the late Republican *album*, namely senators, knights and *tribuni aerarii*. Later, Caesar removed the latter and replaced them by a greater number of knights. The *lex Aurelia* tells us that the *album iudicum selectorum* listed an impressive 900 *iudices selectae*, 300 senators, *equites* and *tribuni aerarii*, respectively.³⁷ These 900 *iudices* were divided into three *decuriae*, each 300 members strong. Probably these *decuriae* were mixed units where senators, knights and *tribuni aerarii*, and later senators and knights were represented on an equal basis. Pompey reports that Caesar modified the selection criteria in the sense that only the richest of the qualified were included in the *album*. This is indicative of what we know from other sources, namely that qualification for judicial office indeed depended *inter alia* on property. *Tribuni aerarii* had to have a property rating of 300,000 *sesterzes*, and *equites* one of 400,000 to be eligible for office.³⁸

From the time of the Principate, senators appear increasingly to have been relieved of their judicial duties. Thus, it became exclusively the knights who sat as judges. The *praetor* drew lots annually from the general list and assigned *iudices* to the special lists for civil and criminal proceedings.³⁹ Practically every three years a full *decuria* was freed from the judicial service. From the time of the Principate, the *album* ceased to be prepared annually. Moreover, the emperors themselves came to be involved in the selection.⁴⁰

³⁶ Frier, *Roman Jurists*, 200; Brogгинi, 1962 *NJW*, 1651; Kaser and Hackl, *ZPR*, 50-51 are sceptical about the full relevance of these late Republican legislative measures to the civil proceedings, but see also Kaser, *TR* 32 (1964), 354-355. Kelly, *Roman Litigation*, 102 states: "The figure of the *iudex privatus* in the Roman system of judicature was a respectable one, if for no other reason than that the lists of judges were composed of members of the upper strata of Roman society; originally only senators could be judges, then, in the late Republic, *equites* were admitted to the honour." See also Dawson, *Oracles*, 106: "The praetors, like the *iudices*, ordinarily came from the upper ranks of Roman society."

³⁷ Borkowski, *Textbook*, 63; Frier, *Roman Jurists*, 199-201; Lengle, *ZSS (RA)* 53 (1933), 275-283; Kaser and Hackl, *ZPR*, 193-194; Broggini, 1962 *NJW*, 1652. For further details see Birks, *CLJ* 47 (1988), 54.

³⁸ For a detailed overview see Birks, *CLJ* 47 (1988), 52-56; Jones, *Criminal Courts*, 86-90. The *album* applied to civil and criminal courts. See Kaser and Hackl, *ZPR*, 193-196, and *TR* 32 (1964), 357 fn84. Under Augustus, senatorial rank was granted to persons who owned at least one million *sesterzes*. See Wells, *Römisches Reich*, 16.

³⁹ Kaser and Hackl, *ZPR*, 51.

⁴⁰ *Ibid.* at 193; Kelly, *Princeps Iudex*, 81.

An important feature of the Republican single *iudex* was that he was chosen by the parties. It is appropriate, therefore, to describe the Roman *iudex* as a juror.⁴¹ However, they not only decided matters of fact, as do modern jurors, but heard and gave judgement on the whole suit before them.⁴² Initially, the parties to a lawsuit appear to have been free to decide on any man above a minimum age and, later, even on a foreigner (*peregrinus*) as their judge. The *praetor* accepted any suitable suggestion as to the choice of judge and assigned the case formally to the person chosen as judge.⁴³ Only women (*feminae*), minors (*impuberes*), those mentally disturbed (*furiosi*), and the deaf (*surdi*) were excluded from the office.⁴⁴

Where the parties were not able to present an acceptable *iudex* to the *praetor*, a two-stage procedure was applied. Historians have advanced alternative views as to the precise course of events. It is suggested that the parties first took turns in rejecting. Each rejected a *decuria* until, when only one *decuria* remained, each rejected, in turn again, one of the judges listed in that *decuria*. The defendant had the last rejection. This interpretation is based on the so-called *lex Irnitana*, found near Sevilla, Spain in 1981.⁴⁵ Prior to this important discovery, another view of the procedure for selection of judges was favoured. According to this view, the *praetor* read names from the annually prepared *album* in order to assist the parties (*ferre iudicem* or *procari iudicem* = to demand a judge) in their choosing. If there was no agreement,

⁴¹ For an overview on the various descriptions in the literature see Sigillito, *SLLJ* 33 (1989), 484-485. Further Kaser and Hackl, *ZPR*, 48.

⁴² Dawson, *Oracles*, 101.

⁴³ For details on the selection process see most recently Metzger, *New Outline*, 61-76; further Birks, *CLJ* 47 (1988), 39-40 and 50-51; Simshäuser, *ZSS (RA)* 109 (1990), 184; Kaser and Hackl, *ZPR*, 195; Rodger, *JRS* 81 (1991), 87-89; La Rosa, *IURA*, 40 (1989), 63-74; Galsterer, *JRS* 78 (1988), 78-90; Paricio, *Sicurezza Giuridica*, 192 and *Administración de la Justicia*, 34 - all these with specific regard to the new information provided for by the recently discovered *lex Irnitana*. Partly outdated, therefore, Dawson, *Oracles*, 101-103 and *Lay Judges*, 27-29; Borkowski, *Textbook*, 63 and 67; Kaser, *RPL*, 405 and 408; Van Warmelo, *Principles of Roman Civil Law*, 278; Thomas, *Textbook*, 85-86; Jolowicz, *Roman Law*, 181; Wieacker, *Recht und Gesellschaft*, 69; Kunkel, *RG*, 82-84; Steinwenter, *iudex*, 2467; Mazeaud, *Nomination du Juge*, 117-120; Simshäuser, *Iuridici*, 13-14 and Lokin, *Prota*, 59.

⁴⁴ Kaser and Hackl, *ZPR*, 195; Kaser, *RPL*, 405; Berger, *Iudicare*, 518.

⁴⁵ See the authorities referred to above in fn43. Generally with regard to the *lex Irnitana* see Gonzalez, *JRS* 76 (1986), 147-150; Simshäuser, *ZSS (RA)* (1990), 163-164. See also Johnston, *JRS* 77 (1987), 62-76. The text of the *lex Irnitana* can be found in *JRS* 76 (1986), 153-181, a translation by M H Crawford is provided for at 182-199, followed by a commentary by J A González at 200-238.

the *praetor* assigned a judge from the album by drawing lots (*sortiri iudicem*).⁴⁶ The essential question with respect to the procedure of appointment of judges is to what extent one can draw conclusions about Roman procedure at large from the *lex Irnitana* since this was only a provincial statute. However, the prevailing opinion answers this question in the affirmative.⁴⁷

The task of the *iudex* was to decide on questions of law (*iudicare*). *Iudicare*, however, was similar to but not identical with *ius dicere*. The differences have been described as follows:

“*Jus dicere* has the same etymological sense as *iudicare*. But while the latter word was applied to the settlement of a legal dispute by means of judgement, the Romans used *ius dicere* and its derivatives to describe the activities of the jurisdictional magistrate, who did not himself pronounce the final judgement but merely had a presidential or introductory function in the case.”⁴⁸

In Republican Rome, the *iudices*, like the *praetores*, initially held their public court (*pro tribunali*) in the *comitium* and on the *forum*; later, according to Kaser, only in the *comitium*. For this purpose a platform had to be erected on which the *iudex* and his advisors took their seat. The two parties appeared before (or rather below) him and argued the case.⁴⁹

From what has been said above, it is evident that the Republican *iudex* was as much a layman as the *praetor* and as such he relied on the advice of the *pontifices* and, later, on his *consilium* of jurists.⁵⁰ The judicial office was an honorary duty, a *munus publicum*.⁵¹ To shy away from

⁴⁶ Dawson, *Oracles*, 101-103 and *Lay Judges*, 27-29; Borkowski, *Textbook*, 63 and 67; Kaser, *RPL*, 405 and 408; Van Warmelo, *Principles of Roman Civil Law*, 278; Thomas, *Textbook*, 85-86; Jolowicz, *Roman Law*, 181; Buckland, *Textbook*, 608; Wieacker, *Recht und Gesellschaft*, 69; Kunkel, *RG*, 82-84; Steinwenter, *Iudex*, 2467; Wesel, *Geschichte des Rechts*, 175; Mazeaud, *Nomination du Juge*, 117-120; Simshäuser, *Iuridici*, 13-14.

⁴⁷ For details see Birks, *CLJ* 47 (1988), 49-50, further Metzger, *New Outline*, 61-63; Johnston, *JRS* 77 (1987), 62, 66 and 77. Now also Kaser and Hackl, *ZPR*, 195 and Simshäuser *ZSS (RA)* 109 (1990), 167-168 and 185-188. Nonetheless La Rosa, *IURA* 40 (1989), 68-74, suggests that Roman practice would not have allowed the parties to elect a judge who was not listed on the *album*, and Galsterer, *JRS* 78 (1988), 83 shares the view that at Irni the election procedure was likely to have been simplified in contrast to the method used at Rome.

⁴⁸ Kunkel and Kelly, *An Introduction to Roman Legal and Constitutional History*, 2ed Oxford (1973), 85 as quoted at Ellis, 1987 *Obiter*, 18. See also Kaser and Hackl, *ZPR*, 41; Berger, *Iudicare*, 519; Schulz, *Classical Roman Law*, 13.

⁴⁹ Jolowicz, *Roman Law*, 186 fn3; Kaser and Hackl, *ZPR*, 51 and 202-203 with further references in fn3, 9 and 10. Kunkel, *ZSS (RA)* 85 (1968), 320 fn153, however, states that civil law suits before the *iudex privatus* did not have to be performed in public and on a platform. He argues that it is unlikely that a *iudex* assembled a platform for the one case to which he was appointed. (*Tribunalia* for public use seem not to have existed in Republican days). Therefore, Kunkel concludes that the *iudices* stood at the forum while hearing and deciding simple law suits (probably near those areas where the court of the praetor was held, for which see fn26). There might also have existed the practice of hearing a case in the judge's home.

⁵⁰ Dawson, *Lay Judges*, 27-29 and *Oracles*, 101; Frier, *Roman Jurists*, 199; Jolowicz, *Roman Law*, 187; Kelly, *Western Legal Theory*, 42; Kaser, *OZÖR* 19 (1969), 381-391; Kaser and Hackl, *ZPR*, 197; Brogini, 1962 *NJW*, 1652; Schulz, *History of Roman Legal Science*, 52, who says: “In every branch of Roman life it was the practice that a man who had to

this task without good reason was generally considered bad form.⁵² That Roman *iudices*, particularly in the days of the late Republic, were drawn from the legally untrained members of the superior classes rather than from the ranks of the professional jurists or counsellors, is evident, for instance, from the fact that a mere 74 jurors appear to have been identified by name in M C Alexander's survey of 391 trials from 149 B.C. to 50 B.C.⁵³ Of these, the majority were criminal trials and thus involved a large number of jurors (*questiones*). For our purposes however, what is more interesting is how many single judges (mostly in civil suits) Alexander's survey identified by name. If my counting is correct, there were merely five civil cases and two cases where the claim was based on the *actio iniuriarum* where single judges known by name gave a judgement. In only two of these cases a well-known jurist, namely P. Mucius Scaevola, sat as judge.⁵⁴ Thus the survey confirms that generally the legal ability or the fame of the judge was usually insignificant by comparison with that of the advocates or jurists arguing before him.⁵⁵ It was purely by chance that a trained jurist was elected *praetor* or was chosen as a judge in a case.⁵⁶

The lay knowledge of the Republican judges is stressed by some scholars. Lay *iudices* are frequently described as victims of the brilliant rhetoric and eloquence of the Roman *oratores* who argued before them in court by means of the *genus iudiciale*, the procedural speech or

make a serious decision should take counsel of competent and impartial persons...There is clear evidence that in Cicero's day *iudices* normally took jurists into their *consilia*; the magistrates did the same, at least on occasion...". And Kunkel, *ZSS (RA)* 85 (1968), 325-326 contains a useful description of the actual involvement of the *consilium* in the judicial decision, where it is said that the judges regularly turned to their advisors while in court and openly discussed with them the legal aspects of the pending case as well as the final judgement.

⁵¹ See Giménez-Candela, *Cuasidelitos*, 9-12 for details. Further note Lokin, *Prota*, 59 who refers to the *publieke plicht* of the *iudex*.

⁵² Horace in his *Epistles* vol.I.16 at 40 asks: "Who is a good man?", and answers that a good man's attributes are, among others, serving as a witness, acting as a guarantor, and being a judge. Quoted at Borkowski, *Textbook*, 58. For exceptions see Giménez-Candela, *Cuasidelitos*, 10-11. Further Steinwenter, *Iudex*, 2466; Dawson, *Oracles*, 103 and *Lay Judges*, 28; Lokin, *Prota*, 59.

⁵³ *Trials*, 228-229.

⁵⁴ *Ibid.* cases 22, 73, 76, 126, 352, 353 and 366. P. Mucius Scaevola adjudicated in cases 22 and 352.

⁵⁵ Note for instance case 121 in Alexander's survey, a civil suit for *missio in possessionem*. Apparently all details of the persons involved are known, i.e., the names of the defendant (P. Quinctius), his advocate (M. Iunius Brutus), the procurator (Sex. Alfenus), the plaintiff (Sex. Naevius) and the praetor (probably P. Burrenus). The only person who remained unnamed was the judge. See Alexander, *Trials*, 63. Further note Broggin's comments in 1962 *NJW*, 1651 fn2.

⁵⁶ Dawson, *Lay Judges*, 29.

oration.⁵⁷ And finally without some continuity of tenure there was little chance to develop anything like legal expertise.⁵⁸ In any event, the modest legal knowledge of the *iudices* was evident to all.

At the time of Augustus, the three *decuriae* were enlarged by a fourth, and a fifth was finally added by Caligula.⁵⁹ Generally, the Republican system of selecting and appointing judges was continued in the early Principate. However, changes were in the offing. Even though the formulary system and consequently bipartition between *praetor* and *iudex* was retained within the traditional (ordinary) form of procedure, an extraordinary system of proceedings, the so-called *extraordinaria cognitio* or *cognitio extra ordinem* (*cognitio* = an investigation) came to the fore with Augustus. It sowed the seed of destruction of bipartition. It is important to note that the transition from ordinary to extraordinary jurisdiction was a gradual process, and both systems of proceedings operated side by side for quite some time. It took about three hundred years, from Augustus to about the reign of Diocletian (284-305 A.D.), before the *cognitio extra ordinem* effectively replaced the ordinary system of formulary proceedings.⁶⁰ By the year 342 A.D., the latter was formally abolished.⁶¹ Considering the reluctance of the early emperors to overthrow in too overt a manner the Republican order and to break with the *mores maiores*, it is evident that modifications were made only in new fields of law.

⁵⁷ See the book review of B W Frier's *The Rise of the Roman Jurists* by Birks, *OJLS* 7 (1987), 448; also Brogini, 1962 *NJW*, 1652 who tells us of none other than the great Cicero describing the role of the *oratores* as follows: "I want the *oratori* to cause the following experiences. If one hears that he is about to address the court, one rushes in to take a seat. The court is full...there are plenty of spectators and the *iudices* are all attentive. The orator rises from his seat and the audience is asked to be silent; but later the applause is ample: if the *oratori* asks for laughter, there is laughter; if he ask for tears, there are tears such that if someone who would only listen, not knowing what in fact is going on, must think that there is a great artist on the stage." Further Neumeister, *Das Antike Rom*, 75-81. See also Kaser and Hackl, *ZPR*, 360 fn50 and 53 with useful references.

⁵⁸ Dawson, *Oracles*, 103.

⁵⁹ Kaser and Hackl, *ZPR*, 193; Dawson, *Oracles*, 102; Birks, *CLJ* 47 (1988), 37 and 53. For more details on the division of the various epochs of Roman (legal) history followed in this thesis see fn2.

⁶⁰ Generally see Borkowski, *Textbook*, 73; Van Zyl, *Roman Private Law*, 384 fn77; Van Warmelo, *Principles of Roman Civil Law*, 280-281; Kaser, *RPL*, 396-397 and 426; Kaser and Hackl, *ZPR*, 436; Kunkel, *RG*, 130; Hattenhauer, *ERG*, 78-80. J. Macz, *Roman Law*, 400 states: "Republican institutions were not abolished, but new imperial institutions grew up by their side, with the result that they became atrophied and finally perished. This process however was not complete until the Principate had given way to the dominate."

⁶¹ Ellis, 1987 *Obiter*, 24; Simshäuser, *Iuridici*, 5; Thomas, *Textbook*, 120; Kaser, *RPL*, 397.

Three fields have been identified as the roots of the *cognitio* proceedings.⁶² At first there was the so-called *cognitio extra ordinem* in a narrow sense.⁶³ These were new actions on questions that were beyond even the *praetor's* power to enact a new formula. However, it was the emperors who accepted the need for a modification and assumed jurisdiction for these actions. Consequently, imperial delegates were authorised as judges and ordered to decide the matter.⁶⁴

The second field, the carving out of the emperors' own appellate jurisdiction, is of considerable importance to the subject of this thesis. Rarely did Roman emperors act as a court of first instance and, apart from the *cognitio extra ordinem*, this originally took place only outside of Rome on the base of special petition.⁶⁵ However, from the end of the first century, the *principes* began to assume true appellate jurisdiction. Initially, the only judgements subject to appeal were those of the *cognitio extra ordinem* in a narrow sense. *Decreta* of the courts of ordinary jurisdiction remained sacrosanct for a long time. Later, however, the emperors ceased to refrain from far-reaching interference on appeal. The first domino to fall among the ordinary forms of proceedings was the proceedings *in iure* before the *praetor*. As a first step (from about the reign of Claudius (41-54 A.D.), the emperors began to set aside and refer back either *formulae* or *decreta* to the *praetor* or the *iudex*. The second step, which appears to correspond with the beginnings of post-classical law (at about the third century A.D.), were the so-called reformative appeals with which the *principes* began to replace the final judgements of the *iudices*.⁶⁶

The third major field of importance to the proceedings *extra ordinaria cognitio* was the proceedings at the courts in the Roman provinces. There were two distinct groups of provinces, one of which had never known the two-fold system of formulary proceedings.⁶⁷

⁶² Generally on this process see Kaser and Hackl, *ZPR*, 438-443; Jolowicz, *Roman Law*, 400-404; Prichard, *RPL*, 450-451; Kaser, *RPL*, 396-397 and 426-427; Kelly, *Princeps Iudex*, 80-84 and 91-99; Wieacker, *Recht und Gesellschaft*, 70-72; Simshäuser, *Iuridici*, 4; Steinwenter, *Iudex*, 2469-2471.

⁶³ See particularly Kaser and Hackl, *ZPR*, 451-460.

⁶⁴ *Ibid.* at 438.

⁶⁵ Wieacker, *Recht und Gesellschaft*, 70; Kaser and Hackl, *ZPR*, 439, 445-451 and particularly 501-510.

⁶⁶ Contra Kelly, *Princeps Iudex*, 97-98 who accepts full reformative appeals already from the age of Nero (54-68 A.D.). Against him Kaser and Hackl, *ZPR*, 503 fn15 and 504 fn18. Also Litewski, *RIDA* 11 (1964), 348-365.

⁶⁷ Some of the provinces were administered directly by the *principes*, so-called imperial provinces. It was proposed that in those provinces which were under governorship of knights (*praefecti*, Pontius Pilatus for instance belonged to the order of knights and administered the province of Judaea) formulary forms of proceedings could not have been used, unlike the

From an early stage, cases were heard in accordance with the extraordinary system of *cognitio* proceedings. In provinces of the other kind, justice was administered by means of the formulary system of proceedings.⁶⁸ However, from the beginning of the Dominate,⁶⁹ owing to a shortage of suitable *iudices* in the ranks of the local honoraries, it often happened that the Roman governors chose a judge from the ranks of eminent Romans, and few litigants dared to question this.⁷⁰ From the time of the Dominate, it also became obvious that this tendency to interfere in the form of proceedings was increasingly extended to other aspects of procedural law. Thus, to some degree, the accompanying degeneration of the formulary proceedings in Rome emanated from the conditions in the Roman provinces.⁷¹

The ordinary courts continued to be staffed by lay *iudices* drawn from the *album*, whereas the extraordinary courts were staffed exclusively by imperial servants who conducted all of the various stages of the lawsuit (*principium*, *medium litis*, *definitiva sententia*) and held *imperium merum et mixtum*.⁷² Initially, these courts were staffed by *consules* and, later, by specially appointed *praetores*, who did not have much more in common with the old Republican jurisdictional magistrates than the name, in itself evidence of the cautiousness with which the early emperors initiated modifications.⁷³ Since the *principes* were the holders of the general *imperium*, which again included *iurisdictio*, the judicial officers active at the extraordinary courts had only delegated jurisdiction (*iurisdictio mandata*). While hearing appeals, the emperors were advised by a *consilium* of jurists (*consilium principes*).⁷⁴ Towards the end of the use of formulary proceedings, it became obvious that even before the ordinary courts parties no longer had the right to agree on a judge, and that the judges were appointed

practice in legatorial provinces (administered by the *legati Augusti pro praetore*) since the governor lacked the magisterial *imperium* and therefore the *ius edicendi*. See Jolowicz, *Roman Law*, 408 fn2; Kunkel, *RG*, 58; Wells, *Römisches Reich*, 13-15, 154, 157 and 164; Kaser, *RPL*, 396; Kaser and Hackl, *ZPR*, 439-440; Dawson, *Lay Judges*, 31-33.

⁶⁸ These provinces were the so-called senatorial provinces which remained under the administration of the senate, which elected the governor annually. See Wells, *Römisches Reich*, 154. For instructive examples from the province Baetica (Southern Spain) during the reign of the Flavian emperors (second half first century A.D.) see Birks, *CLJ* 47 (1988), 36-48.

⁶⁹ From about Commodus and the Severine Emperors (180 A.D.). This development might be related to the general crisis in the empire up to about 260 A.D. See also Kaser and Hackl, *ZPR*, 441.

⁷⁰ Unrestricted agreement of the parties as to choice of the *iudex* in some provinces is reported until the reign of Trajan (98-117 A.D.). See Simshäuser, *Iuridici*, 14 with further references at fn38. For the preceding period of the Flavian *principes*, this is generally confirmed by Birks, *CLJ* 47 (1988), 36-48. See also Kaser and Hackl, *ZPR*, 468-470.

⁷¹ Kaser and Hackl, *ZPR*, 441; Kaser, *RPL*, 426; Jolowicz, *Roman Law*, 403-404; Simshäuser, *Iuridici*, 9-21.

⁷² Thür and Pieler, *Gerichtbarkeit*, 392.

⁷³ For details see Kaser and Hackl, *ZPR*, 460, 462-466. For the development outside Rome see at 466-471.

by the *praetor*. These appointed judges were named *iudici dati*.⁷⁵ And, since this procedure had been the practice in some of the provinces, it once again confirms the degenerative influence that emerged from outside the capital.⁷⁶

With the reign of Diocletian, the Dominate reached its climax.⁷⁷ The administration of the empire was reformed and the provinces divided into smaller units.⁷⁸ This had immediate consequences for the administration of justice, which now came to be shaped in a form much closer to our modern legal systems. The empire became a tetrarchy and was divided into 4 realms, 12 dioceses and 112 provinces. The provinces were administered by either (so-called) *proconsules*, *consules*, *corectores* or *praesides*; the dioceses by a *vicarius* and the realms by a *praefectus praetorio*. In keeping with this division, a triad of courts emerged, too.⁷⁹ The lowest (local) judges (*iudices minores*) were the *duoviri* or *magistrati municipales*, who were commonly advised by the town councillors, the *curiae*.⁸⁰ In-between these were the *iudices medii*, the provincial governors of the variously ranked provinces who adjudicated at the provincial courts.⁸¹ The highest judges (*iudices maiores*) sat on the benches of the courts of the *vicarii*, the *praefecti praetorio* as well as the court of the *principes* at Rome, the emperor's council (*consistorium principes* or, in legal matters the *auditorium principes*). This court was staffed by, among others, the heads of the imperial cabinets (*officia*) and a number of councillors (*comites consistoriani*).⁸² All *iudices maiores* were *iudices sacra* or *vice sacra*, in other words holy or imperial judges who adjudicated in place of the emperor.

⁷⁴ Kunkel, *RG*, 104; Kaser and Hackl, *ZPR*, 441 and the text below at fn82.

⁷⁵ Wieacker, *Recht und Gesellschaft*, 70; Kaser and Hackl, *ZPR*, 461 fn7 and 462.

⁷⁶ See the text above at fn71 and Kaser and Hackl, *ZPR*, 519-520.

⁷⁷ The emperor as master and God (*dominus et deus*). See Kunkel, *RG*, 127; Van Warmelo, *Principles of Roman Civil Law*, 19-21; Van Zyl, *Roman Private Law*, 7; Kaser, *RPL*, 5; Liebs, *RR*, 80; Köbler, *Bilder*, 30; Hattenhauer, *ERG*, 83-84.

⁷⁸ For more details see particularly the work by Kuhoff, *Senatorische Laufbahn*. Furthermore Kelly, *Western Legal Theory*, 79-81; Kunkel, *RG*, 128; Simshäuser, *Iuridici*, 4-5; Kaser and Hackl, *ZPR*, 517; Hattenhauer, *ERG*, 85.

⁷⁹ For the following see above all Wieacker, *Recht und Gesellschaft*, 70-73 and also Kaser and Hackl, *ZPR*, who provide an overview at 529-532, whereas a detailed account appears at 532-550. Further Kaser, *RPL*, 430; Thomas, *Textbook*, 121; Demougeot, *L'Empire Romain*, 230-232; Steinwenter, *Iudex*, 2470-2472; Kunkel, *RG*, 129-130; Simshäuser, *Iuridici*, 14-15; Ferguson, *ILR* 46 (1960-61), 734.

⁸⁰ Kaser and Hackl, *ZPR*, 545-547.

⁸¹ Kuhoff, *Senatorische Laufbahn*, 50-110; Kaser and Hackl, *ZPR*, 530, 532-533.

⁸² The four heads of the *officia* were the *magister officiorum* who was chief of the imperial chancery, the *quaestor sacri palatii*, a kind of minister of justice, the *comes sacrarum largitionum* and the *comes rerum privatarum*. See Kuhoff, *Senatorische Laufbahn*, 112-148 (*vicarii*), 194-228 (*notarii* and *magistri scriniorum*); Jones, *Later Roman Empire*, 506-507; Kaser and Hackl, *ZPR*, 448; Kunkel, *RG*, 128. Further Spruit, *Enchiridium*, 120-121. It is interesting to note that some

The hierarchical nature of the imperial system of administration of justice is further apparent from the formal ranking to which judges were subject. Accordingly, *sacri* judges were classified either as *illustres* (*praefecti praetorio* and *urbi*) or *spectabiles* (*vicarii*). *Iudices medii* were ranked as *clarissimi* (provincial governors). The superior judges as well as the intermediate judges were entitled to delegate cases to subaltern judges, the so-called *iudices pedanei*.⁸³ The *iudices dati* were ad hoc commissars especially appointed by the emperors.⁸⁴ In Rome, the old magisterial praetors finally lost their ordinary jurisdiction to the *praefectus urbi*, who became the head of the city court of first instance.⁸⁵ The same applied in Constantinople. These *praefecti urbi* were also entitled to delegate to *iudices pedanei*.

It is absolutely essential to appreciate that these officers performed both judicial and purely administrative functions.⁸⁶ The *iudices* of the post-classical period therefore were civil servants fully incorporated into the various ranks of the imperial administrative machinery. They were appointed to their respective offices for a term of one to three years.⁸⁷ It is, therefore, not surprising that in imperial terminology the term *iudex* was no longer restricted to the officers of the judiciary, but applied generally to all leading members of the administration.⁸⁸ Ironically, therefore, the term *iudex* came to cover also those Republican magisterial offices which traditionally were strictly separated from the office of the old lay *iudex*. We will have to return to this aspect in due course.

of the most illustrious jurists during the Principate and Dominate sat on this council. For instance Iavolenus Priscus, L. Neratius Priscus, P. Iuventius Celsus, Salvius Iulianus, Q. Cervidius Scaevola, Aemilius Papinianus, Iulius Paulus and Domitius Ulpianus. The emperors, like the Republican *praetores* and *iudices*, initially held court in public at the *forum*. From the time of Severus the emperors' court sat in the imperial palace.

⁸³ From *cum pedes* = at feet, in other words judges who sat *parterre* and not elevated on the higher tribunal. See also Kaser and Hackl, *ZPR*, 547-551 and 548 fn1a and 2; Ferguson, *ILR* 46 (1960-61), 734.

⁸⁴ Kaser and Hackl, *ZPR*, 448 fn15.

⁸⁵ *Ibid.* at 539.

⁸⁶ Dawson, *Lay Judges*, 33.

⁸⁷ Kaser and Hackl, *ZPR*, 527; Thür and Pieler, *Gerichtbarkeit*, 394.

⁸⁸ A complete list of all *iudices* of the Byzantine days is included under C 3.1.14.1. See further Jones, *Later Roman Empire*, 500 and 502; Steinwenter, *Iudex*, 2471; Hochstein, *Obligationes Quasi ex Delicto*, 15; Hübner, *IURA* 5 (1954), 208; Weitzel, *Iudex*, 793-794 refers to a *Entdifferenzierung* (lack of differentiation) that became typical of the classification of judges and other members of the administration during the post-classical period. In this respect see also Kaser and Hackl, *ZPR*, 526-527.

Diocletian's structure continued to exist, with a number of politically necessary modifications, well into the Byzantine age.⁸⁹ After Justinian's expulsion of the Vandals from Africa (534-535 A.D.) and the Ostrogoths from Italy (535-553 A.D.), the final structure until the late seventh century A.D. appears to have been the following: *iudices maiores* remained the judges at the emperor's court, as well as at the courts of the two remaining *praefecti praetorio per Occidentem* and *per Orientem* and at the courts of the two *praefecti urbi*.⁹⁰ *Iudices medii* became the judges at the courts of the lower ranked governors, while *iudices minores* remained the municipal magistrates, the *duoviri* (or *duumviri*), complemented by the *defensores civitatis*, a kind of neighbourhood judiciary.⁹¹ Most of these post-classical Roman judges remained laymen.⁹² Although some of the provincial governors were chosen from the ranks of the advocates, the majority of the officers were selected for their noble birth.

From the time of the late Principate, it appears that imperial *iudices* engaged in the administration of justice employed so-called *adssessores*, legally trained assessors, to compensate for their own inadequacy.⁹³ These assessors were trained jurists and came to be engaged as civil servants, without, however, any independent jurisdiction. They advised the *iudices* and were quite influential. The *adssessores* complemented the *consilium*, which remained in operation throughout the post-classical period.

Thus, the Roman judicial office was characterised by the change from a lay judge, an elected juror, an ordinary citizen to an authorised administrative imperial officer who, even though

⁸⁹ These changes resulted especially from the gradual decay of the Western Empire prior to its ultimate demise in 476 A.D. In Africa, Spain, Gaul, general Roman jurisdiction ceased to exist and after 476 A.D. Visigothic and Burgundian kings delegated jurisdiction over the Roman population of their now sovereign kingdoms to former Roman civil officers. See also below at chapter III 1.

⁹⁰ The city of Rome and the surrounding provinces remained under Byzantine sovereignty for another 130 years as the so-called Ducat of Rome and the Exarchat of Ravenna. These were later to become the backbone of the Pontifical State. See Wesenberg and Wesener, *Privatrechtsgeschichte*, 23 and chapter III 1 fn18.

⁹¹ Kaser and Hackl, *ZPR*, 544-547. The *duumviri* were nominated by their predecessors. Selection was from the ranks of the local town council (*decuriones*). Appointment generally lay to the council (*curia*). The term of office was one year. See *inter alia* D 47.10.13.5; C 3.1.18; C 10.32.45. See *ibid.* 545 fnn3 and 4 for further details and references.

⁹² Jones, *Later Roman Empire*, 502: "In the later Roman empire legal training was...not expected of a judge." Also Dawson, *Lay Judges*, 33.

⁹³ Kaser and Hackl, *ZPR*, 550. See also Jones, *Later Roman Empire*, 500-501; Dawson, *Lay Judges*, 33.

not a professional jurist, was a trained public servant.⁹⁴ With regard to the subject of this thesis, two aspects of this development need to be emphasised: first, the judge the parties faced from the days of the late Principate onwards regularly was the official representative of an increasingly authoritative political system. As representatives of the emperors, judges were invested with far-reaching powers to ensure legal obedience. This stood in dramatic contrast to the status the judges enjoyed under the formulary system where the authority of the judge, at least to some extent, was dependent on the consent of the parties. Secondly, by means of incorporation of the judge into the state bureaucracy, the judiciary for the first time became subject to imperial control and discipline.⁹⁵

2 JUDICIAL LIABILITY FOR WRONG JUDGEMENTS

For a lucid presentation of the liability of judges in Roman law, it is helpful to subdivide the relevant period of about a millennium into three sections: namely liability prior to the formulary form of procedure, under formulary proceedings and, finally, under the system of the extraordinary *cognitio* proceedings. The latter two sections will be further divided into three parts: first a more detailed outline of the form of proceedings as far as they bear relevance to our subject; next, a discussion of the development of the state of mind required for liability; and, finally, consideration of the question of the kind of wrongs for which Roman judges were made liable.

2.1 Judicial liability in the XII Tables and during the early Republic

The earliest indications of the liability of judges are lost in the mist that surrounds the dawn of Roman law.⁹⁶ What we do know is that according to the XII Tables the acceptance of a bribe

⁹⁴ Kaser and Hackl, *ZPR* 519. Ferguson, *ILR* 46 (1960-61), 734 correctly observed that: "The *judices* were thus Imperial officials rather than the private citizens of earlier times. Similarly, the independent office of the *praetor*...had been extinguished and blended with the functions of the *judex* (judge) in the imperial prefect."

⁹⁵ This theme is also stressed by Ferguson, *ILR* 46 (1960-61), 734-735.

⁹⁶ MacCormack, *Liability of the Judge*, 5.

made the *iudex* subject to capital punishment.⁹⁷ In addition, it is probable that the early Republican *ius civile* under the *legis actio* system of procedure provided for a civil remedy against a judge, who acted *litem suam facere*; in other words, who made the case before him his own.

Writers have advanced this view on the basis of several arguments. To some, the term *litem suam facere* indicates more a consequence than an element of an offence. In this sense, it is a typically archaic way of describing a specific type of liability: "...[t]he *iudex* takes over, as a result of his own wrongdoing, a liability which would otherwise have fallen on one of the parties to the action."⁹⁸ Technically this was possible if the injured party were permitted to consider the judge as a *iudicatus*, someone against whom judgement was given and against whom personal execution, the so-called *legis actio per manus iniunctionem* lay.⁹⁹ In this form, the liability of the judge *qui litem suam fecit* may have been part of sections of the XII Tables that were not preserved.¹⁰⁰ It has been suggested, further, that liability of the *iudex* was an appendix to a form of criminal punishment that was developed shortly after the enactment of the XII Tables.¹⁰¹

Other writers accept the view that the judge's liability *litem suam facere* was developed prior to praetorian intervention as a type of liability *sui generis*. This solution gains some degree of plausibility in analogy with a second legal concept, where a case was awarded to one party when the other failed to appear (*litem addicere*). Similarly, a judge, could be liable where he failed to be present in court.¹⁰² In fact, from a later period, the second century B.C. to be

⁹⁷ MacCormack, *Liability of the Judge*, 3-5; Kelly, *Roman Litigation*, 102; Schmidt-Speicher, *Rechtsbeugung*, 15.

⁹⁸ Stein, *RIDA* 5 (1958), 564.

⁹⁹ Hübner, *IURA* 5 (1954), 207; MacCormack, *Liability of the Judge*, 5; Karlowa, *Rechtsgeschichte*, 1349. Generally on the *legis actio per manus iniunctionem* see Van Zyl, *Roman Private Law*, 370; Van Warmelo, *Principles of Roman Civil Law*, 273-274; Borkowski, *Textbook*, 60-66; Kaser, *RPL*, 400-401; Medicus, *Interesse*, 1423; Jörs/Kunkel/Wenger *Römisches Recht*, 435-442.

¹⁰⁰ Pernice, *Labeo*, 168-169; Stojcevic, *IURA* 8 (1957), 69: "...un institut ancien...le quasi-délit si *iudex* était connu dès la Loi des XII tables..."; Hübner, *IURA* 5 (1954), 205: "Dass die Regelung der Richterhaftung in die Zeit einer formalen Typisierung zurückreicht und nicht erst als *actio in factum* dem *ius honorarium* entwachsen ist, ist kaum zu bezweifeln."; Hochstein, *Obligationes Quasi ex Delicto*, 14.

¹⁰¹ Levy, *Privatstrafe*, 48-49. Against this notion Hübner, *IURA* 5 (1954), 202 with further references: "...[A]ls Indiz gegen den Strafcharakter der Haftung [wird] die von Ulpian bekämpfte Meinung Julians zu werten sein, der die Haftung auf den Erben des *iudex* erstrecken will. War die Klage gegen den Erben möglich...so konnte sie keine Deliktsbusse sein...".

¹⁰² Karlowa, *Rechtsgeschichte*, 1349; MacCormack, *Liability of the Judge*, 5-6 and see the references there at fn6. With regard to *litem addicere* see Kaser, *TR* 32 (1964), 351-352 with further references.

precise, we know that a judge was held liable *litem suam facere* if he failed to deliver his judgement or did not appear in court.¹⁰³ It is not inconceivable that this kind of omission may have attracted liability already in the days of the early Republic. About other instances of liability imposed on judges in pre-edictal law, we have not much knowledge.¹⁰⁴

2.2 Judicial liability from the late Republic to the beginning of the post-classical period (300 B.C. - 200 A.D.)

The considerable degree of uncertainty that surrounds developments during the first centuries of Roman law gives way to more clarity from the time of the late Republic. The phase of development that followed coincides with the emergence of the *ius honorarium* and the heyday of the so-called system of formulary proceedings.¹⁰⁵

Sometime between the second century and the early decades of the first century B.C., a *praetor* must have decided to include into one of his annual edicts (*edicta perpetua*) an *actio in factum* against an *iudex* and made this available to anyone who had suffered from a judicial wrong. Henceforth, the judge was not a substitute for the defendant within the original suit but was subject to an autonomous edictal action by an injured party. This development was born from a desire for more flexibility, as well as the practical need to provide the parties with some kind of redress which took proper account of the peculiarities of the formulary system of procedure. However, some more detail is needed on the practical conditions of this system of proceedings to provide a better background to the development of the liability of the *iudex*.¹⁰⁶

¹⁰³ Macrobius, *Saturnalia*, 3.16.15. For details see below at fn136. In drawing on those omissions enclosed in Macrobius' *Saturnalia*, Cremades and Paricio, *AHDE* 53 (1984), 188-189 and also D'Ors, *SDHI* 48 (1982), 380 share the opinion adduced *inter alia* by Hübner, MacCormack and Karlowa.

¹⁰⁴ See also Usteri, *Verantwortlichkeit des römischen Richters*, 10 who proposes that at a transitional stage between the old actions on grounds of the XII Tables and the edictal *actio in factum* a judge could have been liable under the *actio iniuriarum* or the *actio legis Aquiliae*.

¹⁰⁵ In principle, all writers agree on this general proposition. See *inter alia* Hochstein, *Obligationes Quasi ex Delicto*, 15; Hübner, *IURA* 5 (1954) 200-201; MacCormick, *Acta Juridica* 20 (1977), 149-151, 157; Stein, *RIDA* 5 (1958), 563; Stojcevic, *IURA* 8 (1957), 63; MacCormack, *Liability of the Judge*, 9 and 20; Birks, *TR* 52 (1984), 373; Pugsley, 1969 *IJ*, 351-355. For the division of the various epochs of Roman (legal) history followed in this thesis see again fn2.

¹⁰⁶ A useful overview on the consequences of the formulary proceedings in the light of the liability of the *iudex* is provided by MacCormick, *Acta Juridica* 20 (1977), 149-151; further see MacCormack, *Liability of the Judge*, 20; Hübner, *IURA* 5 (1954), 201 and 206; Borkowski, *Textbook* 355; Van Warmelo, *Principles of Roman Civil Law*, 222. More generally Kaser

As indicated above, the system of formulary proceedings was characterised chiefly by the bipartite proceedings before the *praetor* and before the *iudex*. The proceedings before the *praetor* (*in iure*) were concluded with the formal act of the *litis contestatio*. It extinguished the plaintiff's initial claim against the defendant. From this point, legal effectiveness lay exclusively in the remedy defined by the *praetor* in the *formula*. This *formula* was granted by the *praetor* by virtue of his *imperium* (*iurisdictio*) as a magistrate.¹⁰⁷

There followed the trial phase before the selected judge (*apud iudicem*).¹⁰⁸ Irregularities and mistakes during this phase could lead to liability of the judge. After the proceedings *in iure* had been completed with the declaration of *litis contestatio* and after the judge had been selected¹⁰⁹, the proceedings were led over to the trial phase *apud iudicem* by means of a magisterial announcement of the first trial day (*intertium dare*).¹¹⁰ According to Gai.4.15, the parties generally agreed to appear before the *iudex* on the third day after the hearing *in iure*. At the time of the formulary forms of proceedings, however, the scheduled trial day was no longer referred to as *comperendinus* (*tertius*) *dies*, but as *intertium* or *in tertium*.¹¹¹ The party at whose petition the *praetor* had scheduled the trial day had to serve notice on the other party and the judge three days in advance of the effective trial day (*denuntiare*). Under specific circumstances, i.e., severe or chronic illness of a party or the judge, the trial had to be

and Hackl, *ZPR*, 220-382 and Kaser, *RPL*, 401-411 and 417-423; Van Zyl, *Roman Private Law*, 372-380; Prichard, *RPL*, 443-450; Thomas, *Textbook*, 83-110; Van Warmelo, *Principles of Roman Civil Law*, 275-279; Borkowski, *Textbook*, 66-73; Ellis, 1987 *Obiter*, 16-27; Kunkel, *RG*, 80-90; Liebs, *RR*, 37-41; Ferguson, *ILR* 46 (1960-61), 733-734.

¹⁰⁷ Kaser and Hackl, *ZPR*, 288. The *formula* consisted of the *nominatio* (nomination of the judge), *intentio* (exposition of the claim), *condemnatio* (instruction to condemn or to absolve). For details Thomas, *Textbook*, 95-102; Van Zyl, *Roman Private Law*, 373-377; Borkowski, *Textbook*, 67 and Kaser and Hackl, *ZPR*, 310-322 and 350.

¹⁰⁸ For details on to the proceedings *apud iudicem* see particularly Kaser and Hackl, *ZPR*, 350-375. For a detailed analysis in the light of the *lex Irnitana* see the work by Metzger, *New Outline*. The work contains references to most of the recent contributions in this field. The crucial question with regard to the *lex Irnitana* is to what degree one may draw from it conclusions about Roman procedure in general.

¹⁰⁹ With regard to the appointment of judges see the text above at fn45 *et seqq.*

¹¹⁰ At this stage it might be appropriate to draw attention to a modified view which has been adduced only recently by Metzger, *New Outline*, 91. To him the *lex Irnitana* ensured a divided hearing *in iure*. After the settling of legal questions, but prior to the fixed appointment of the judge who heard the trial, a break permitted a prospective judge to learn ahead of time of his selection. A hearing after the break allowed him to advance grounds to excuse himself from office. Only thereafter did the magistrate fix the trial day and appoint a judge.

¹¹¹ With regard to the various possibilities of spelling (and hence understanding) *intertium* see Metzger, *New Outline*, 29-30. Most scholars agree that *intertium* was the successor to *comperendinus dies*. Note Metzger, *New Outline* 77-88.

adjourned (*diffisio* or *diem diffindere*).¹¹² Unless adjournment was effectively granted, the trial would be held on the exact day that had been fixed by the magistrate and both judge and parties were required to appear.

Only a few sources allow us to draw proper conclusions on the details of the trial phase before the *iudex*. A substantial part of the judge's task was to hear evidence in regard to the assigned formula. It nonetheless would be grossly incorrect to believe that points of law were merely raised at the proceedings *in iure*. On the contrary, wherever the formula granted to the judge the right to exercise discretion, the *iudex* was called upon to settle questions of law. For these purposes, the *iudex* was assisted by his *consilium* (referred to above), the need for whom would otherwise be difficult to explain. On the principle of *curia novit iura*, whether or not he acted on advice of his *consilium*, the *iudex* conducted the trial and granted or revoked the parties' or witnesses' right to speech. In addition, common principles of procedure, such as *audi alteram partem* or orality, were accepted and had to be observed. The trial was supposed to begin, be carried out and completed with judgement given on one and the same day, in any event before sunset.¹¹³ In principle, however, adjournment during the trial phase *apud iudicem* by a judge was permitted by granting a divided or fictional day (*diem diffindere*) so that the condition of one trial day was met over a series of days.¹¹⁴

Once evidence had been heard, the judge was obliged to give judgement (*sententia*). Only by swearing *rem sibi non liquere*, i.e., that the case had not become clear to him, could he evade this obligation, which corresponded to his *munus publicum*.¹¹⁵ Judgements usually lacked any opinions upon which the judge had based his decision.¹¹⁶

¹¹² Most detailed, again, is the presentation of Metzger, *New Outline*, 91-152. See further Kaser and Hackl, *ZPR*, 356 and Giménez-Candela, *Cuasidelitos*, 29-40. It has not been undisputed whether it was the praetor/magistrate or the judge himself who decided on the grant of adjournment. The former view is held, among others, by Giménez-Candela, *Cuasidelitos*, 35; the latter is favoured by Lamberti, *Labeo* 36 (1990), 191-193.

¹¹³ Kaser and Hackl, *ZPR*, 357-359; Metzger, *New Outline*, 101 fn2 with vast references.

¹¹⁴ See especially the comments by Metzger, *New Outline*, 101-103; Kaser and Hackl, *ZPR*, 358; Giménez-Candela, *Cuasidelitos*, 14-15; Simshäuser, *ZSS (RA)* 109 (1990), 202-203.

¹¹⁵ There might be such a case in Alexander, *Trials*, 38 (case 73) where it is stated that the judge refused to adjudicate. The possibility of the *iudex* to escape liability by swearing *rem sibi non liquere* generally invites the question as to the relationship between this clear confession of the judge not having grasped the underlying questions of fact or law of the case before him and the well-known maxim *error iuris nocet*, that is that generally mistake (*error*) or ignorance (*ignorantia*) of law were not regarded as excusable (even though there applied numerous exceptions to that rule). For an overview of the development see Zimmermann, *Law of Obligations*, 604-606 and Mayer-Maly, *Error Iuris*, 150-167 and

It must be understood that the *sententia* the judge gave at the end of the proceedings *apud iudicem* was final and binding.¹¹⁷ There was no possibility of appeal and there was equally no point in going back to the *praetor* for a new formula.¹¹⁸ The claim in itself was consumed once the formula had been granted. Only in rare circumstances could the *praetor* grant a *restitutio in integrum*, which most likely would be countered by the opposing party by means of an *exceptio rei iudicatae vel in iudicium deductae*.¹¹⁹ What is also important to note is that it was absolutely immaterial to the extinction of the initial claim whether the final decision of the *iudex* was correct or not. The decision was final and binding.¹²⁰ This was the formulary system's harsh but effective solution to the problem of achieving *res iudicata*, i.e., legal certainty.

At least in theory, thus, any conceivable mistake in the application of substantive or procedural law, which provoked either a wrong judgement or no judgement at all, was strictly speaking impossible for the prejudiced party to overcome. The following three examples will demonstrate these severe consequences of formulary proceedings.

Consider first a judge who failed to adjourn the trial properly. In consequence of the strict application of the one-day rule, the formula was consumed and it became impossible for the prejudiced party to resume the case. A second instance is that of the consequences of a wrong judgement. With the *sententia* in hand, the winning party was able to proceed immediately with the execution of the judgement, which, with the survival of the principle of personal

Rechtsirrtum, 302 and see below at chapter IV 3 1 fnn 163 *et seqq.* The lack of detailed comments by the Roman authorities during pre- and high-classical Roman law indicate that apparently this problem (as regards the liability of the *iudex*) was not identified as such. There is only one very brief passage at *D* 24.3.17.2 that deals with a mistake due to *ignorantia* of a *iudex*. However, there is no indication as to the judge's liability, rather the plaintiff was advised to make use of the *exceptio doli*. See also below at 2 2 1 at the end.

¹¹⁶ Visky, *BIDR* III ser. 18 (1971), 739-745; Kaser and Hackl, *ZPR*, 371 fn 17 b.

¹¹⁷ Dawson, *Oracles*, 102.

¹¹⁸ Litewski, *RIDA* 11 (1968), 356 fn 48 and 50.

¹¹⁹ Thomas, *Textbook*, 104; Kaser, *RPL*, 407.

¹²⁰ McCormick, *Acta Juridica* 20 (1977), 153; Kaser, *RPL*, 420; Van Zyl, *Roman Private Law*, 379. Kaser and Hackl, *ZPR*, 375 state: "Mit dem Urteil wird der Rechtsstreit...endgültig entschieden. Es kann weder vom Richter selbst zurückgenommen noch vom einsetzenden Magistrat...aufgehoben werden. Erst unter dem Prinzipat entwickelt sich...eine Berufung an den Kaiser."

execution in those early days, could lead to the debtor's being killed or enslaved.¹²¹ Thirdly, dangers to the parties derived not only from the decision itself but also from the conduct of the lawsuit by the judge. The duration of the proceedings *apud iudicem* was statutorily restricted. Litigation was not open ended.¹²² So-called lawsuits *iudicia legitima* had to be finished within eighteen months, while so-called lawsuits *iudicia imperio continentia* had to end with the ending of the *praetor's* term of office, which was one year.¹²³ If the plaintiff instituted his claim near the end of the *praetor's* term of office and if the *iudex* delayed judgement beyond these time limits, the plaintiff likewise enjoyed no legal protection.¹²⁴

Taking these harsh consequences into account, there was obviously only one possibility for providing a litigant who suffered from a judicial wrong with adequate redress under the system of formulary proceedings: an *actio in factum* against the judge under the edict *Si iudex litem suam fecerit*.¹²⁵ This was the praetorial solution to an inherent problem in the system of formulary proceedings, namely to reconcile the aim of *res iudicata* with some control on judicial irregularities other than by appeal, which, as a more refined concept of administration of justice, was not yet available to parties during the late Republic. With this in mind, two questions emerge: Was there a certain state of mind required before a *iudex* could be held liable under the edict; and secondly, for what kind of wrongs was the *iudex* held liable?

Distinguishing those two questions is absolutely essential in order not to lose one's bearings in an area of Roman law that has attracted much controversy with numerous renowned academics entering the ring to advance or to defend their suggestions and interpretations.

¹²¹ See Kaser and Hackl, *ZPR*, 383-401; Kaser, *RPL*, 421-423; Thomas, *Textbook*, 109; Van Warmelo, *Principles of Roman Civil Law*, 279; Van Zyl, *Roman Private Law*, 379-380; Borkowski, *Textbook*, 70-71. However, under the formulary system of procedure personal execution was increasingly pushed into the background by execution against property (*missio in bona*).

¹²² Tab. XII.1.7-9. See Kaser, *TR* 32 (1964), 352.

¹²³ *D* 2.12.1.2 and *D* 2.12.3 pr. Further Hübner, *IURA* 5 (1954), 201; Thomas, *Textbook*, 93; Lokin, *Prota*, 58.

¹²⁴ See particularly Simshäuser, *ZSS (RA)* 109 (1990), 176.

¹²⁵ Van Warmelo's view is exactly on this point when he observes in his *Principles of Roman Civil Law* at 222 that "...if a judge were to deliver a wrong judgement, there was either no possibility of appeal or a limited possibility only. The judge was therefore, held personally liable for a wrong judgement and could be sued by a victim for the damage he had suffered." Note also Paricio who states in his *Sicurezza Giuridica* at 193 that: "*La decisión del juez (siempre y cuando, como veremos, fuese dada dentro de los límites de los fórmula) era válida, y el condenado venía obligado a acatarla y cumplirla. Esto es tanto como decir que la sentencia era ya ejecutable.*" And he concludes: "*El único camino del que eventualmente disponía el vencido era oponerse cuando se intentara contra él la actio iudicati...*". See also Cremades and Paricio, *AHDE* 54 (1984), 190-191.

2 2 1 State of mind

Until high-classical law (about 100-200 A.D.), liability was strict, i.e., not dependent on the state of mind of the judge.¹²⁶ In other words, the liability of the judge was established simply by proof that he had given a false judgement; it was not necessary for the plaintiff to lead

¹²⁶ Of those views advanced, the one accepted here appears to be the prevailing opinion. The general scope of this thesis does not allow to deal with these questions in the greatest possible detail. Therefore, the following two footnotes will try to provide an overview (not concluding) of the vast literature on the subject of the required state of mind for the liability of the *iudex* together with references to the controversial opinions.

(The 1990s): The most recent contribution appears to be O F Robinson's article 'The *'iudex qui litem suam fecerit'* explained' in *ZSS (RA)* 118 (1999) forthcoming; Metzger, *New Outline*, 104, 134-141, 152-153; Schrage, *Legal History* 17 (1996), 101-129 states that "...it seems logical not to take mere subjective culpability into account."; Lamberti, *Labeo* 36 (1990), 265: "*Ecco perché si potrebbe anche essere d'accordo con quegli autori che addirittura ritengono la menzione dell'imprudenza come non allusiva a fattispecie colpose, bensì carica di un significatio 'più forte', espressione di un criterio di valutazione 'obiettivo' della condotta del giudice...*". Note further the arguments advanced by Giménez-Candela, *Cuasidelitos*, 41-55.

(The 1980s): Zimmermann, *Law of Obligations*, 17-18 points out that "[c]lassical lawyers...generally emphasising more objective criteria of liability, did not have any difficulty in taking these situations [typical examples of quasi-delictual liability] for what they really were: namely cases of strict liability." D'Ors, *SDHI* 48 (1982), 393 accepts that the "...*categoría cuasi-delictual es precisamente lo que se ha considerado como 'responsabilidad objetiva'...* En el caso del *iudex*, la causa de la acción es, como hemos visto, la omisión de sentencia, es decir, el incumplimiento de un *munus*, independientemente de toda consideración de dolo o culpa." However, one must bear in mind that D'Ors restricted judicial liability to very few instances. For details see below text at fn162. D'Ors' view of the relevant state of mind in pre- and high-classical law was generally accepted as sound by Cremades and Paricio, *AHDE* 54 (1984), 179 *et seqq.* See also Paricio's, *Cuasi delitos*, 40 *et seq.* and *Sicurezza Giuridica*, 194 where he states that: "*Su [the judge's] responsabilidad era objetiva...*".

(The 1970s): Hochstein, *Obligaciones Quasi ex Delicto*, 15-16, 23-24: "*Nach dem kann mit erheblicher Sicherheit davon ausgegangen werden, daß es sich bei den quasi-deliktischen Tatbeständen zunächst um Fälle einer objektiv qualifizierten Haftung handelte...*".

(The 1960s): Gordon, *Temis* 21 (1967), 304: "It seems simpler to accept the evidence that liability was in fact objective." And Pugsley, 1969 *IJ*, 353 fn12 agrees when he states "...the common factor...is strict liability." Nicholas, *Introduction*, 225: "In the classical law, however, it seems that his liability was indeed strict...".

(The 1950s): Seidl, *SDHI* 18 (1952), 343: "*Es bestätigt die Lehre...dass im klassischen Recht der iudex non ex maleficio, sondern aus der Gefahrenbeherrschung allein haftete: er beherrschte die Gefahr...ohne dass man ihm ein Delikt vorwerfen musste, ja auch ohne dass man ihm auch nur Fahrlässigkeit vorzuwerfen brauchte...*"; Stein, *RIDA* 5 (1958), 569 states that "...it was unnecessary to shew further that he [the judge] was either fraudulent or negligent."; Jonas, *BLR* 6 (1954), 431 concludes: "Although the [classical] interpreters of the *Lex Aquilia*, came to insist on the presence of fault as a condition of liability, there remained areas in the Roman law which provided for liability regardless of fault. These fields are found in the quasi-delicts." Hübner, *IURA* 5 (1954), 204: "*...die Richterhaftung basierte dann nicht auf der Ahndung schuldhafter Pflichtverletzung, sondern auf objektive qualifizierter Schadensverteilung aus Gefahrtragung...*"

(Prior to the 1940s): See *inter alia* Pernice, *Labeo*, 248-249; Lenel, *Edictum Perpetuum*, 167-168.

evidence to show *dolus* or *culpa* on the part of the judge.¹²⁷ For obvious reasons, this had arisen from the formulary system of proceedings under which the parties were largely subject to the authority of the *iudex* without a chance of appeal.¹²⁸ One of the crucial questions in this respect is how to interpret the various texts that refer to the liability of the *iudex*, *qui litem suam fecit*. Some of these texts contain no reference at all to the *iudex*'s state of mind¹²⁹; others seem to refer to *imprudentia*¹³⁰ (as a particular form of *culpa*) and one even to *dolus malus*.¹³¹ How can these passages be reconciled with the notion of strict liability?

¹²⁷ Other opinions which have been raised with respect to the state of mind required for the *iudex*'s liability include most recently Kaser and Hackl, *ZPR*, 196 fn38. They share the view that, as early as classical law, liability of the judge was for so-called typical *culpa*. See further Birks, *CLP* 22 (1969), 173. Buckland, *Textbook*, 599 and *Manual*, 331-332 suggested that the concept of judicial liability was based upon vicarious liability in the sense that even though the judge is liable for his own wrongdoing he takes over a foreign liability which, normally, would have fallen on one of the parties to the case. Similarly Sandars, *Institutes*, 424. Others, namely Kelly, *Roman Litigation*, 102-117 and Stojcevic, *IURA* 8 (1957), 71 advance the view that, from the late Republic already, the liability of the judge was not based on strict liability but upon some kind of culpability on the part of the *iudex*, that was either *dolus* or *culpa*. Broggin, 1962 *NJW*, 1652 restricts the *iudex*'s liability from the days of Cicero to *arglistige Handlungen* which are acts *dolo malo*. Tomulescu, *IURA* 24 (1973), 87 generally accepts the view that liability is for *dolus* in cases of illegal sentences, whereas for procedural mistakes it is for *dolus* and *culpa*. Pauw, *THR-HR* 42 (1979), 242 appears to favour Kaser's view, that already in classical law liability was for typical *culpa*: "Dit lyk dus asof die grondslag van aanspreeklikheid nie *dolus* is nie maar *imprudentia*...Sy gedrag kom dan na aan Kaser se 'typisierte *culpa*'." However, note also Professor Birks's more recent contribution in *TR* 52 (1984), 384 fn34 where he expresses his dissatisfaction with his earlier view that liability was for actual or typical *dolus* and, instead, favours liability for *culpa* (in its narrow sense). In his eyes strict liability is not necessary to explain the scope of judicial liability by the time of high-classical law. *Dolus*, on the other hand, is not exclusively relevant because nowhere is it said by the sources that liability was for *dolus* alone. Moreover, Birks argues that as a category of *dolus* liability is rarely of practical importance (at 384) because it is nearly impossible to prove *dolus* on the part of the judge (a thought which was also advanced by the Dutch jurist Voet as early as the seventeenth century. For details see below chapter V 4 I 5). More recently, Borkowski in his *Textbook* at 335 introduced the idea that liability of the *iudex* (as in the case of all the other quasi-delicts) was based neither upon strict liability, nor on vicarious liability, but on the fact that a judge is entrusted with conduct of the case. However, this comes very near to Hübner's view. See the authors discussed below at fn143 to complete this overview of the abundant literature on the issue of the state of mind required for judicial liability under the formulary system of proceedings.

¹²⁸ Hübner, *IURA* 5 (1954), 201: "...seiner Macht weitgehend ausgeliefert." Contra Stojcevic, *IURA* 8 (1957), 71 "...c'est dans cette mesure que Hübner n'a pas raison lorsqu'il avance que le juge romain avait une position plus difficile que le juge d'aujourd'hui."

¹²⁹ Macrobius, *Saturnalia*, 3.16.15; *Antinoopolis Papyrus* I. 22; Gai 4.52; *lex Irnitana* Chapter 91.Tab. X. A 51 and B 15. For a discussion see the text below at fn132-139.

¹³⁰ *Inst* 4.5 pr which is very similar to *D* 44.7.5.4 and *D* 50.13.6. For details see the text directly below.

¹³¹ *D* 5.1.15.1. Since this text is from Ulpian, notably an (early) post-classical Roman jurist, a discussion appears more appropriate in the following section. See below at 2 3 I.

D 50.13.6, which is thought to have been extracted from the third book of Gaius's *res cottidianae*, as well as the almost identical D 44.7.5.4 and *Inst* 4.5 pr, refer to judicial wrongs committed through *imprudencia*.¹³² At first glance, therefore, these passages contain a clear indication of the judge's state of mind.

*"Si iudex litem suam fecerit [non proprie ex maleficio obligatus videtur. Sed quia neque ex contractu obligatus est, et utique pecasse aliquid intellegitur licet per imprudentiam: ideo videtur quasi ex maleficio teneri in factum actione, et] in quantum de ea re aequum religioni iudicantis visum fuerit poenam sustinebit."*¹³³

The key to proper understanding of this section is that the text from *fecerit* to *in quantum* was interpolated some centuries later at the time of Justinian when the texts of the classical jurists were edited for inclusion in Justinian's *Corpus Iuris Civilis*. Therefore, the implication as to the *iudex*'s state of mind is not genuinely classical.¹³⁴

If one accepts this view, the lack of indication of subjective culpability in high-classical law corresponds neatly with another set of texts which have not been subjected to the compilers' interpolations and which, therefore, are considered genuinely pre-classical or high-classical.¹³⁵ In one of these texts, we are told of a group of men occupied with mistresses while engaged in drinking and gambling games, somewhere in Rome. This in itself surely was not a rare sight in Roman days. However, what makes this text a valuable contribution is the following. At least one of the men appears to have been selected as *iudex* and is supposed to hear some cases later that day. In order to enjoy a high old time until the latest possible hour, they send a servant to report on what is happening at the forum, what acts have been passed or turned down. Finally, they decide to leave for the forum to avoid any liability *litem suam facere* which their friend undoubtedly would have faced had he not heard the cases the *praetor* had assigned to him on the basis of his *imperium*. However, on their way they waste no opportunity to have some more drinks and reach the forum in a rather peevish mood. The

¹³² Gaius lived and wrote during the second century A.D. and is considered a high-classical jurist. See Honoré, *Gaius*, 68-69.

¹³³ D 44.7.5.4 ends at *teneri* and has no *et* before *utique* and *Inst* 4.5 pr is distinct from D 50.13.6 in that it lacks *in factum actione* and *videbitur* replaces *visum fuerit*.

¹³⁴ See Lenel, *Edictum Perpetuum*, 169. Even Kelly, *Roman Litigation*, 111 agrees with Lenel on this point: "...Lenel regards everything in the Gaius passage...as interpolated, so that the *imprudencia* concept is got out of the way, at any rate so far as the classical period is concerned. The latter suggestion seems acceptable...". See further Stein, *RIDA* 5 (1958), 567-568. Other writers hold the view that Gaius never tried to specify the behaviour (state of mind) that constitutes a wrong. See MacCormack, *Liability of the Judge*, 19-20 or Hübner, *IURA* 5 (1958), 203.

¹³⁵ MacCormick, *Acta Juridica* 20 (1977), 152 with regard to Gai 4.52.

hearing of the case commences, witnesses are heard, but the judge absents himself for a while. On his return, he declares that he has followed the testimony and asks for the documents, but with all the wine he has consumed he is hardly able to open his eyes:

“Ubi horae decem sunt, iubent puerum vocari ut comitium eat percontatum quid in foro gestum sit, qui suaserint, qui dissuaserint, quot tribus iusserint, quot vetuerint. Inde ad comitium vadunt, ne litem suam faciant. Dum eunt, nulla est in angiporto amphora quam non impleant, quippe qui vesicam plenam vini habeant. Veniunt in comitium, tristes iubent dicere. Quorum negotium est narrant, iudex testes poscit, ipse it minctum. Ubi redit, ait se omnia audvisse, tabulas poscit, litteras inspicit: vix prae vino sustinet palpebras.

Later, when he retires to prepare the judgement, he whispers to his boon companions that he does not care about these dull people (the parties) and that he would rather have another bottle of wine and something decent to eat.

Eunt in consilium. Ibi haec oratio ‘quid mihi negotii est cum istis nugatoribus, quin potius potamus mulsum mixtum vino Graeco, edimus turdum pinguem bonumque piscem, lupum germanum, qui inter duos pontes captus fuit?’¹³⁶

In this context, it is interesting that such forms of judicial misbehaviour apparently did not result in immediate liability. This confirms the view taken above that mainly liability lay for those wrongs that effectively resulted in loss of the action, as would have been the case had the judge not appeared at the Forum to hear the case. The following part of the *Antinoopolis papyrus* 22, which dates back from the fourth century A.D., and which was discovered in the winter of 1913-14 in Sheikh Abada, has been considered equally predicative.

“Item Pomp[onius] scr[ibit]. Si falso t[utore] a[uctore] male fuerit diffis(s)us dies, ed[ictum] q[ui]d[em] cessare, et iudicem, q[ui]a neq[ue] diffidit neq[ue] s[ententi]am dixit, litem suam fe[cisse] videri...”.¹³⁷

If a judge ordered an invalid adjournment (*male fuerit diffisus dies*), he was supposed to have acted *litem suam facere* since he had neither adjourned properly nor given sufficient *sententia* for or against a party. Under the formulary system of proceedings, this implied that the case was not resumed. A choice text is Gai4.52:

“Debet autem iudex attendere, ut cum certae pecuniae condemnatio posita sit, neque maioris neque minoris summa posita condemnet; alioquin litem suam faciat.”

¹³⁶ This text from Macrobius's *Saturnalia*, 3.16.14-17 reproduces a speech by C Titius on the pre-classical *lex Fannia* from about 161 B.C. The pre-classical origins of this passage are also stressed by Cremades and Paricio, *AHDE* 54 (1984), 187.

¹³⁷ See *Antinoopolis Papyri*, 47; Seidl, *SDHI* 18 (1952), 343; Hübner, *IURA* 5 (1954), 203-204 and more recently Giménez-Candela, *Revisión*, 557-562.

Here Gaius makes the point that a judge had to be careful not to condemn a party contrary to the condemnation clause of the *formula*; otherwise, he would make the case his own since the party would have lost any opportunity to resume the case.

It is evident that none of the three instances of judicial wrongdoing postulated earlier indicate anything with regard to the state of mind of the *iudex* involved. Alternatively, there is no doubt as to the serious threat the *iudex* faced, namely being held liable once he failed to obey certain essential requirements. This apparent lack of any indication of culpability in pre-classical and high-classical texts also derives from a passage from the *lex Irnitana*. In this *lex*, it is indicated that a judge would be held liable, *uti lis iudici arbitrove damni sit*, where he did not return a verdict in time or where he forgot to extend the period of his appointment in time, regardless of any form of culpability.¹³⁸

“...si neque dies diffis<s>us neque iudicatum fuerit, uti lis iudici arbitrove damni sit...” and “...si neque diffi[s]sum e lege neque iudicatum sit per quos dies quoque loco ex h(ac) l(eg)e iudicari licebit oportebit...”¹³⁹

This is strikingly similar to the regulation in the *Antinoopolis papyrus* which has just been quoted.¹⁴⁰ The same principle (no indication of culpability) also applies to judges who adjudicated in cases which were not yet up for adjudication: “...rem in iudicio non esse oporteret...”¹⁴¹

The impression given by the examples above is strict liability of the *iudex* during the period from about 300 B.C. to 200 A.D., which was predominantly under the influence of the system of formulary proceedings.¹⁴² Its purpose was to protect the parties from the harsh

¹³⁸ D’Ors, *SDHI* 48 (1982), 374-377 says: “Baste observar...cómo este capítulo cuya transcripción nos hemos permitido adelantar, trata del intertium, de la diffissio y del juez que, por no hacer bien la diffissio ni dar sentencia, asume en propio perjuicio la causa, que deja de estae en juico. Es el temor de esta caducidad de la acción, por omisión del iudex, lo que provoca que el juez asuma las consecuencias de la acción por él frustrada.” See also Giménez-Candela, *Cuasidelitos*, 37-40 and Mayer-Maly’s review of Giménez-Candela’s work in *TR* 60 (1992), 194-196 for further details.

¹³⁹ Chapter 91.Tab.X. 51-53 and B 15-16.

¹⁴⁰ Metzger, *New Outline*, 104; D’Ors, *SDHI* 48 (1982), 376; Giménez-Candela, *Cuasidelitos*, 41; Lamberti, *Labeo* 36 (1990), 253.

¹⁴¹ Chapter 91.Tab. X. B 7-8.

¹⁴² At this point it should be remembered that not all the writers who deal with the *lex Irnitana* would agree on the proposition that the sequence of the passages shows that judicial liability initially was strict. See Birks, *TR* 52 (1984), 384 and Simshäuser, *ZSS (RA)* 109 (1990), 177.

consequences of judicial wrong.¹⁴³ Strict liability and, in consequence, the avoidance of the difficult burden of establishing the judge's state of mind was adequate compensation for the inherent disadvantages of the system.

Aside from the texts and the difficult question of interpolation, another two arguments can be raised in favour of the view that in Republican and earlier classical law judicial liability was strict.

In the first place, the development of the Roman law of legal liability makes it evident that in early Roman law, as in so many other early legal systems, the required state of mind was based upon the notion that whoever committed the deed, the externally visible event, had to bear the consequences regardless of any subjective factors.¹⁴⁴ At a further stage of

¹⁴³ This appears to be the appropriate place to refer to a number of scholars who favour a more restricted liability of the *iudex* only for (proved) culpable acts from as early as the time of the late Republic. In their eyes, practical reasons, above all others, negate the feasibility of strict liability. *Iudices* were either chosen by the parties or drawn by a lot, they were generally unpaid and non professional. In this regard, Kelly, *Roman Litigation*, 112, makes the point that "...it seems hardly likely that a judge in the period of formulary procedure would have consented to hear any case if he knew that any carelessness on his part would raise a presumption of *litem suam facere*." Stojcevic, *IURA* 8 (1957), 71 refers to policy considerations, for instance pacification and the protection of the authority of the magistrate: "*Toutefois, les juges n'étaient pas juges de profession et ne devaient pas posséder de connaissances juridiques. C'est pourquoi il pouvait facilement leur arriver de méjuger. La sécurité juridique et l'autorité de la magistrature auraient été sérieusement ébranlées si les parties avaient pu mettre en cause le juge pour imprudentia...le jugement ne pouvait être attaqué que si le juge avait prononcé sa sentence défectueuse par dol.*" Note, however, that McCormick, *Acta Juridica* 20 (1977), 156 very aptly argues that "...since the parties had agreed to Maevius [fictive person] being judge, if either of them [the litigants] said that Maevius were biased for or against him, or corrupted...such a complainer might fairly have been told he should have chosen better." To return to the critics, it is further argued that Roman litigation in a sense was not too different from today's. There was always and will always be one party which comes out dissatisfied with the judge's decision. But "...[t]hat's life..." according to McCormick, *Acta Juridica* 20 (1977), 151 "...and that's litigation - an institution which systematically dissatisfies half its customers." Without any prospect of appeal it is evident that disgruntled litigants would turn and sue the *iudex* personally where they felt the judge had judged wrongly. Kelly, *Roman Litigation*, 113 makes the additional point that a wide standard of liability would have made the "judicial machinery unworkable." In the affirmative, Simshäuser, *ZSS (RA)* 109 (1990), 177. However, the best argument against Kelly's initial argument is, probably, that if the judge could not reach a decision because either the legal or the factual situation was not properly understood by him he could swear *rem sibi non liquere* (that the case is *not* clear to him). Consequently, another judge would be appointed and the *iudex* would evade any liability. With regard to the latter aspect see Kaser and Hackl, *ZPR*, 354 and fn37, 370 fn3 and Kaser, *RPL*, 419.

¹⁴⁴ Kaser, *RPL*, 186; Hochstein, *Obligationes Quasi ex Delicto*, 20-21; Jörs/Kunkel/Wenger *Römisches Recht*, 229-230 state: "*Am Anfang dieser Entwicklung pflegt ein Rechtszustand zu stehen, der schon die objektive Tatsache des kausalen Zusammenhangs genügen läßt um eine Haftung des Verursachenden zu begründen (reine Erfolgshaftung).*" Note, however, Kaser's view that in reality ancient strict liability (at least in some instances) was already a typified liability for fault or rather *dolus/dolus sciens* (which other scholars accept only at a later stage). In his view someone who committed an act

development, liability arose in respect of an act which, typically, resulted in a conscious infringement of another person's rights, without, as yet however, the specifying of fault (*culpa* in a wide sense) as such. Such conscious infringements of other people's rights were considered an *iniuria*. And *iniuria, inter alia*, became the early base of the *lex Aquilia*. Thus the criterion of *damnum iniuria datum* initially implied *damnum culpa datum*.¹⁴⁵ It was only in classical law that lawyers were prepared to consider, cautiously, the individual fault of the culprit alone. Only now did *damnum culpa datum* come to the fore.¹⁴⁶

In classical law, the distinction between legally responsible and irresponsible behaviour was generally derived from considering typical instances of liability and distinguishing these within the field of 'causation'. Generally, it was only by a direct act that liability could arise. Indirect acts or even omissions came to be included only after the emergence of *culpa* in the sense of negligence and the consequent development of broader (and more flexible) standards of care. 'Causation' and fault therefore were not yet properly separated. Fault was still determined with reference to a number of external and objective aspects.¹⁴⁷ Thus, one can say with *Jörs/Kunkel/Wenger* that in classical law: "The state of mind remained concrete-casuistic. Generalised and abstract concepts were foreign to Roman lawyers."¹⁴⁸ For this reason the prevailing doctrine has termed this intermediate stage of the development of

typically resulting in a loss generally intended to cause this result. See for Kaser's opinion his *RPR I*, 503 as well as *RPL*, 186 and particularly his article in *BIDR* 65 (1962), 79-104. Kaser's view has not gone undisputed. See *inter alia* Wittmann, *Körperverletzung*, 16 *et seqq.* Wittmann holds the view that any discussion about the term *dolus*, whether 'typical' *dolus* or not, implies a subjective and not merely an objective concept of liability. Beyond this, Wittmann believes that as early as the XII Tables both *dolus* and *culpa* were identified. Molnár in *BIDR* III ser. 28 (1986), 465 *et seqq.* on the other hand posits – except in cases of killing – a puristic objective standard of liability, that is *Erfolgshaftung* for early Roman law.

¹⁴⁵ Zimmermann, *Law of Obligations*, 1004; *Jörs/Kunkel/Wenger Römisches Recht*, 231.

¹⁴⁶ Zimmermann, *Law of Obligations*, 1006: "...*damnum iniuria datum* was replaced, for all practical purposes, by *damnum culpa datum*."

¹⁴⁷ Kaser, *RPL*, 186 states: "Indirect causation, as well as the causation through omission, was not included in the Aquilian *culpa* in which causation and fault were still intertwined. It was only the high-classical and late classical period which relaxed the requirement of causation and extended these situations by granting analogous actions."

¹⁴⁸ "*Der Verschuldensbegriff blieb konkret-kasuistisch. Abstrakt-allgemeine Begriffe waren den Römern fremd.*" My translation from *Jörs/Kunkel/Wenger Römisches Recht*, 231. See also Kaser, *RPR I*, 503. Further Zimmermann, *Law of Obligations*, 988 who states: "The analysis of delict in terms of objective and subjective requirements, of factual and normative elements and, more generally of abstract conceptual thinking is thoroughly un-Roman." And at 1008 Zimmermann observes "...Roman lawyers approached the question of *culpa* in a casuistic manner. They did not try to subsume the facts of the individual case under a standardised test or formula."

the concept of fault as ‘typical *culpa*’.¹⁴⁹ Only in the twilight between high-classical and post-classical law did fault emerge as a truly subjective concept based upon the reproachability of the behaviour of the individual in question.¹⁵⁰

It is against this general background that it is argued that judicial liability in early and late Republican law, as well as in earlier classical law, was based upon objective criteria and not as yet on culpability. In other words, the standard of judicial liability initially had to be strict liability. Even though classical law recognised the concept of typical *culpa*, the few genuinely classical passages available do not indicate unequivocally that, as a matter of course, typical *culpa* applied to judicial liability. Any indications of fault or *culpa* in its true subjective sense, which can, anyway, be derived only from Gaius, must have been introduced into the concept of judicial liability at a later stage, most likely in post-classical law under Justinian. The general development of culpability in Roman legal history lends considerable strength to this argument. It is even more conclusive if we recollect that the liability of the *iudex, qui litem suam fecit* was probably not an innovation by the *praetor* but has roots somewhere in the earliest days of Roman law, where strict liability was the case beyond any doubt.¹⁵¹

In the second place, the fact that under the system of formulary proceedings the lay *iudex* was not prevented from swearing *rem sibi non liquere* indicates that apparently the maxim *error* or *ignorantia iuris nocet* did not (yet) apply. This can be taken as another argument in favour the view that for *this* period the question of state of mind was irrelevant. As a matter of fact the doctrine of error is hopelessly keyed to the question of whether or not the actor’s conduct was wilful since, to use a pictorial expression, acting under the influence of error relates to wilful conduct like a mirror image. In this sense the non-application of the doctrine of error in any event implies more of an objective or strict liability approach.

¹⁴⁹ Kaser, *RPR I*, 503 makes the point: “Auch in der klassischen Zeit neigt man ferner immer noch dazu, das Verschulden nach typischen Verhaltenslagen zu beurteilen, die jedoch, der kasuistischen Denkweise gemäß, stark differenziert werden.” See also Kaser, *RPR II*, 349; Hochstein, *Obligationes Quasi ex Delicto*, 24.

¹⁵⁰ Jörs/Kunkel/Wenger *Römisches Recht*, 232 state: “Unzweifelhaft hat die Entwicklung von einem objektiv-typischen Verschulden zum subjektiven Verschulden geführt, doch läßt sich nach Lage der Quellen nicht sicher entscheiden ob diese Entwicklung in der Klassik oder erst in der Nachklassik zum Abschluß gelangt ist.”

¹⁵¹ See Hochstein, *Obligationes Quasi ex Delicto*, 24-25. Contra Hochstein Macheiner in *ZSS (RA)* 90 (1973), 516-517. That objective criteria are likely to have played a decisive role is also affirmed by Zimmerman, *Law of Obligations*, 17-18 who makes the point that classical lawyers generally still emphasised more objective criteria of liability, as was (later) the case at the time of Justinian. Thus he says that “...the liability of the judge in classical law was not dependent either on whether he had negligently (or possibly even intentionally) given the wrong judgement.”

2 2 2 Causes of liability

If strict liability is accepted, the question of what sort of wrongs the Roman *iudex* was to be held liable for becomes considerably more important. It appears from the texts that judicial liability under the formulary system arose essentially from procedural errors.¹⁵² The sources indicate that judicial liability could arise from the following wrongs, all of which, as will be seen, were of a procedural nature: adjudication regardless of *intertium*¹⁵³, failure to perform *diffisio*, i.e., to adjourn the case properly¹⁵⁴, failure to hear and to decide the case within the required period, i.e., within the magistrate's period of office or the eighteen month rule (*mors litis*)¹⁵⁵, failure to appear on the *forum* on the day or at the time fixed for the trial¹⁵⁶, rendering judgement in a case which was not yet pending¹⁵⁷, and, finally, to refer once more to Gaius's example, departing from the binding requirements (*ultra vires*) of the formula. All these examples reflect not so much mistakes on points of fact or law but procedural errors, breaches

¹⁵² MacCormick, *Acta Juridica* 20 (1977), 152 refers to patent errors; Pugsley, 1969 *IJ*, 352 indicates excess of jurisdiction or acts *ultra vires* as the decisive criterion; Birks, *TR* 52 (1984), 383 accepts that "...liability was imposed for mismanagement of the proceedings *apud iudicem*."; MacCormack, *Liability of the Judge*, 19 and 26 stresses the "...failure by the judge to perform one of the basic procedural requirements of his office...". Note also Frier's comment in *Casebook*, 237: "The original nature of this liability is very obscure, and the few texts concerning it are believed to have been heavily altered by the *Digest*'s compilers. But it may be that the original liability was much more narrowly conceived: the *iudex* became liable to the plaintiff if he failed to hear the case at the appointed time, or if he failed to render judgement...By the second century A.D., the *iudex* was liable also for judgements that did not correspond to the formula...". D'Ors, *SDHI* 48 (1982), 368-394 particularly favours a narrow, exclusively procedural, cause of liability. Further, Metzger, *New Outline*, 153; Simshäuser, *ZSS (RA)* 109 (1990), 176-177; Kaser and Hackl, *ZPR*, 196 fn38; Lenel, *Edictum Perpetuum*, 169, who refers to constantly recurring minor illegalities; see also Kübler, *ZSS (RA)* 39 (1918), 216. The majority of the authors referred to above share the view that liability in post-classical law in addition came to be based on errors of substantive law. For developments in the Principate see below at 2 3 2 for more details. From Hübner's contribution, *IURA* 5 (1954), 203 fn16 it is not entirely clear for what period of the development he considers *Rechtsunwissenheit*, that is lack of legal knowledge (= substantial mistakes) as a determinant of judicial liability.

¹⁵³ *Lex Irnitana* chapter 91.Tab.X R: "*Quo iure in tertium denuntiatur, dies diffindatur diffisusue sit, res iudicetur, lis iudici damni sit...*".

¹⁵⁴ See *lex Irnitana* chapter 91.Tab.X. 51 and B 15; *Antinoopolis Papyrus* I.22. Further Metzger's summary in *New Outline*, 146-147 and 152-153; Giménez-Candela, *Cuasidelitos*, 39-42.

¹⁵⁵ No direct indication of liability for failure to hear the case before *mors litis*. However, the *lex Irnitana* refers to that rule in chapter 91.Tab.X. 53 - B 2. See also Hübner, *IURA* 5 (1954), 201; more recently Simshäuser, *ZSS (RA)* 109 (1990), 176; Johnston, *JRS* 77 (1987), 75 fn69 (who appears to favour an even shorter period than that of *mors litis*); Giménez-Candela, *Cuasidelitos*, 39. Apparently, however, the judge always had the opportunity to swear *rem sibi non liquere* in a case where he felt unsafe to decide the suit. In a sense, therefore, Roman law - quite distinct from later periods - did not deal with the problem of denial of justice due to ignorance of the judge, except perhaps for the passage in *D* 24.3.17.2.

¹⁵⁶ Macrobius, *Saturnalia* 3.16.15.

¹⁵⁷ See *lex Irnitana* chapter 91.Tab.X.B 7-8: "...*rem in iudicio non esse oporteret...*".

of judicial duties.¹⁵⁸ In fact, except for the last case, all these examples are evidence of failure to give any judgement at all.

That procedural errors were the main source of liability *litem suam facere* during the period presently assessed also appears from another more recent discovery, namely the *tabula Contrebiensis*, an inscription on bronze from 87 B.C., unearthed near Saragossa only in 1979.¹⁵⁹ The first century B.C. was undoubtedly a period when the system of formulary proceedings was at its height. The inscription is a record of a case heard before a court in Contrebia in Spain. How the judges were appointed by the *praetor* Gaius Valerius Flaccus and what formula was granted to the plaintiff prior to *litis contestatio* is neatly set out. From there the record moves directly on to the decision of the court, as well as the names of the *iudices* and counsel involved and, finally, the place and date of the trial.

What is of considerable importance to the scope of judicial liability under the system of formulary proceedings is that the judgements were not discursive. All that was stated was the final *sententia*, the final judgement. There was no indication, whatsoever, as to the underlying reasoning or application of law.¹⁶⁰ Consequently, it is argued by scholars that there hardly existed a point of departure for a dissatisfied party to sue the judge for anything other than matters external to the court's mental processes.¹⁶¹ It is for this reason, apparently, that liability was imposed only for procedural errors or, in the words of Metzger, for errors that were "...intrinsic' to the trial and capable of proof without resort to matters outside of the events at trial."¹⁶² This view, which is also accepted here, may be termed a 'narrow view' of *litem suam facere*.¹⁶³

¹⁵⁸ MacCormick, *Acta Juridica* 20 (1977), 154; MacCormack, *Liability of the Judge*, 18.

¹⁵⁹ See Birks, *TR* 52 (1984), 375-383; Schrage, *Legal History* 17 (1996), 103. More generally on the *tabula* see Richardson, *JRS* 73 (1983), 33-41 and Birks *et al*, *JRS* 74 (1984), 45-73.

¹⁶⁰ Dawson, *Oracles*, 103; Wesel, *Geschichte des Rechts*, 175.

¹⁶¹ This opinion was ventured initially by D'Ors in *SDHI* 48 (1982), 377-378. Birks in *TR* 52 (1984), 374 *et seq.* accepted D'Ors view as sound but added strength to it with the conclusions he drew from the *tabula Contrebiensis*. For a detailed discussion see *ibid.* at 378-383. An author neither Birks nor D'Ors point to is K Visky who stressed as early as 1971 in his contribution in *RIDA* III ser. 18 (1971), 739-745 that under the formulary form of proceedings judgements included no motivation by the deciding judge on the basis of which a party might have been able to conclude on to the judge's conclusions as to fact or law. Visky's view has been accepted (for this period) by Kaser and Hackl, *ZPR*, 370 fn17b.

¹⁶² D'Ors's and Birks's 'narrow view' (see the title of Birks's contribution in *TR* 52 (1984): 'A new argument for a narrow view of *litem suam facere*') has been accepted by a number of other authors, namely Robinson 'The 'iudex qui litem suam fecerit' explained' in *ZSS (RA)* 118 (1999) forthcoming; Metzger, *New Outline*, 53; Simshäuser, *ZSS (RA)* 109 (1990), 177;

However, actionable judicial wrongs were restricted to those procedural mistakes that effectively resulted in the loss of the suit. In other words, even serious examples of miscarriage of justice, such as breach of the principles of *audi alteram partem*, orality or the actual failure to assess the evidence (as in the case of the drunken judge in Macrobius's *Saturnalia*) did not lead to judicial liability as long as the case was not lost as a result of these procedural mistakes.¹⁶⁴

2.3 Judicial liability in post-classical law (about 200 - 550 A.D.)

Just as knowledge of the ordinary system of formulary proceedings is crucial for a proper understanding of the underlying reasons for a judge's liability well into the high-classical period, so too the implications of the so-called extraordinary *cognitio* proceedings provide the background for the further development of judicial liability up to Justinian's *Corpus Iuris Civilis*.¹⁶⁵

The following characteristics of the proceedings *extraordinaria cognitio*, all significant deviations from the formulary system, should be noted at the outset. First and foremost, the bipartition of the proceedings into the parts *in iure* and *apud iudicem* fell away. One and the same judge conducted the whole case.¹⁶⁶ Consequently, the formula became totally irrelevant. In fact, by the middle of the fourth century the sons of Emperor Constantine, fearing 'hairsplitting' to the disadvantage of the litigants, explicitly abolished the further use of any formulae. Actions were now initiated by a letter to the judge. If the judge approved the *actio*,

Kaser and Hackl, *ZPR*, 196; Giménez-Candela, *Cuasidelitos*, 39; Paricio, *Sicurezza Giuridica*, 194; Cremades and Paricio, *AHDE* 54 (1984), 181-186.

¹⁶³ Taken from Metzger, *New Outline*, 153.

¹⁶⁴ Dawson, *Oracles*, 102-103 states: "If his actions conformed to the formula which conferred his powers, the *iudex* in performing his judicial duties was almost wholly unhampered by procedural rules..."

¹⁶⁵ The term *Corpus Iuris Civilis* was only introduced by the Glossators, however, for the sake of clarity in this thesis, the work will be referred to under this title in the Roman period. Generally for the *cognitio extra ordinem* see Van Zyl, *Roman Private Law*, 385-387; Van Warmelo, *Principles of Roman Civil Law*, 280-281; Thomas, *Textbook*, 119-121; Ellis, 1987 *Obiter*, 24; Kaser, *RPL*, 396-397 and 426-433; Kaser and Hackl, *ZPR*, 471-501, 560-613; Simshäuser, *Juridici*, 5-9; Jones, *Roman Government*, 81-84; Kelly, *Princeps Iudex*, 84-90.

¹⁶⁶ Dawson, *Lay Judges*, 32-33: "The trial judge acquired continuous control over the proceedings before, during and after the trial."

the statement of claim (*libellus*) was delivered by public citation.¹⁶⁷ The defending party responded with a counter statement (*libellus contradictorius*). Summons was by official messenger. At the trial stage, the hearing before the *iudex* was put on record. Judgement was given orally and drawn up in due course. Execution was performed by an officer for which service the parties had to pay high charges. Furthermore, cases were no longer heard out of doors in the *forum*.¹⁶⁸ Instead, the hearings in Rome and Constantinople were moved to the inaccessible *tribunal* at the apsis of the covered basilicas. The apsis was shut off by railings (*cancellae*) and curtains (*vela*). In the provinces court was held at the *praetorium*, the governor's office. From the fourth century, proceedings were no longer open to the public.¹⁶⁹

Another development of considerable importance was the availability of an appeal against a decision of the *iudex*. On the basis of the eternal underlying *iurisdictio* of the post-classical *principes*, a comprehensive system of appeal was developed to perfection. The judgements of the *iudices pedanei* or *dati* could be appealed against at the court of the judge who had delegated the case to them. Likewise, the judgements of the municipal *iudices minores* could be appealed at the provincial courts, and the judgements of the municipal courts of the urban district (within 100 miles) of Rome and Constantinople at the court of the *praefecti urbi*. Judgements of first instance of the provincial *iudices medii* could be rectified either by the *vicarii* or the *praefecti praetorio*. Decisions of the *vicarii* could be challenged at the emperor's court. However, decisions of the *praefecti urbi* were seldom subject to the further intervention of the emperor; and decisions of the *praefecti praetorio* were generally considered non-

¹⁶⁷ For the following see Borkowski, *Textbook*, 74; Jolowicz, *Roman Law*, 404-406; Ferguson, *ILR* 46 (1960-61), 738-740; Van Zyl, *Roman Private Law*, 385-387; Van Warmelo, *Principles of Roman Civil Law*, 280; Thomas, *Textbook*, 119-121; Prichard, *RPL*, 451; Kaser, *RPL*, 430-433; Kaser and Hackl, *ZPR*, 570-617; Wieacker, *Recht und Gesellschaft*, 74-80; Kunkel, *RG*, 130-131.

¹⁶⁸ See the authorities above at fn49.

¹⁶⁹ Kaser and Hackl, *ZPR*, 554-555; Kunkel in *ZSS (RA)* 85 (1968), 320 argues on the basis of Cassius Dio's account that already in Dio's lifetime (from 150-235 A.D.) law suits had been removed from the publicity of the Forum to the seclusion of a court room. For developments from the days of Augustus onwards see generally Kunkel's account at 319-325.

appealable.¹⁷⁰ Judging had become a full-time job, administered by the state as one of the essential features of autocratic government.¹⁷¹

With regard to judicial liability, the three most important aspects of the gradual emergence of the *extra ordinem cognitio* form of proceedings are the following: by the post-classical period, appeal proceedings had become the ordinary legal remedy available to a dissatisfied litigant. Therefore, for the first time the essential impact of the availability of appeal proceedings on the concept of judicial liability is noticeable. Secondly, the typical relationship between a citizen as party to a case and a citizen as judge ceased to exist. By the time of the late Principate, it was replaced by the relationship between the citizen as subordinate and an increasingly autocratic public authority represented by a judiciary staffed by imperial servants. Therefore, thirdly, the peculiarities of the formulary system of proceedings with its implied disadvantages for the parties had withered away. The main underlying reasons for the liability of the *iudex, qui litem suam fecit* of pre-classical and high-classical law no longer existed.

Nevertheless, it appears from the sources that the liability of the judge was retained; although it was adjusted in some respects to suit the new conditions. This tendency manifested itself not so much in the Western Empire, where from the fourth century the law was subject to increasing vulgarisation, but rather in Byzantium; and was of course triggered mainly by adoption of the liability of the *iudex, qui litem suam fecit* in Justinian's *Corpus Iuris Civilis*.

Two proposals have been advanced as to why Justinian retained the concept of judicial liability. On the one hand, it has been suggested that the possibility of appeal gave post-classical litigants far greater opportunity for a remedy than litigants in earlier epochs.¹⁷² It is conceivable that the liability of the *iudex* continued to be available to a party to enable him to

¹⁷⁰ The course of development, however, is too complex to be covered fully in this work. For a detailed survey see especially the work Kaser and Hackl, *ZPR*, 504-506 for the Principate, and 533-536 and 617-623 for the Dominate; also Wieacker, *Recht und Gesellschaft*, 72-73. Further reference may be to Borkowski, *Textbook*, 75; Dawson, *Lay Judges*, 33; Van Warmelo, *Principles of Roman Civil Law*, 281; Thomas, *Textbook*, 121-122; Prichard, *RPL*, 452; Kaser, *RPL*, 433; Kunkel, *RG*, 129-130.

¹⁷¹ Dawson, *Lay Judges*, 33.

¹⁷² MacCormack, *The Liability of Judges*, 22-23; Stojcevic, *IURA* 8 (1957), 74. Contra, however, MacCormick, *Acta Juridica* 20 (1977), 157 and Kelly, *Roman Litigation*, 116-117 who argue that by the post-classical period the liability of the judge must have fallen into complete disuse and become a dead letter since there are remarkably few references to *litem suam facere*. The passages contained in the *Corpus Iuris Civilis* appear to be mostly high-classical. See also Dawson, *Oracles*, 102.

recover the additional costs of appeal (*sportulae*), which are reported to have been tremendous in those days.¹⁷³ The *sportulae* were to the benefit of the *iudex* involved since the judicial salaries were decreased. Thus, the cost of maintaining the administration of justice was increasingly shifted on to the shoulders of the parties. Another aspect worth noting is that litigants faced a considerable degree of uncertainty when going on appeal since appeals from the most remote parts of the empire were handled in Rome, in Constantinople or other major provincial towns by judges and advocates (*advocati*) who never saw or heard the parties involved. Finally, since justice was very slow, an appellant might be faced, for example, with the death or insolvency of the party that won the initial case and against whom appeal of the decision was sought.¹⁷⁴ Bearing these uncertainties in mind, judicial liability must have remained an attractive alternative for litigants.¹⁷⁵

In addition reference must be made to policy considerations. Even though the Roman empire mutated to an autocratic state under the leadership of omnipotent emperors, the *principes* increasingly struggled to maintain the morale of their servants, the effectiveness of the imperial executive or judiciary and the authority of their autocratic government. Corruption, lethargy, decadence and inability became typical of the chronic decay of the late imperial and also the Byzantine administration.¹⁷⁶ The liability of the *iudices*, at least indirectly through the threat of a possible action against a *iudex* by an injured party, was probably one of the few means remaining to the emperors to control their officers.

¹⁷³ Jones, *Later Roman Empire*, 517 states: "There was one law for the rich and another for the poor...Too much scope was given to dilatory tactics, and the fees - not to speak of bribes - were excessive, but an injured party could, if he were prepared to spend the necessary time and money, normally get his remedy." Further Borkowski, *Textbook*, 75; Kunkel, *RG*, 131; Kaser, *RPL*, 430; Kaser and Hackl, *ZPR*, 520 and 557-558.

¹⁷⁴ See Jones, *Later Roman Empire*, 516-517.

¹⁷⁵ The suggestion that judicial liability was in fact an alternative also derives from Jones, *Later Roman Empire*, 504, even though he does not draw that final conclusion. With regard to the restricted availability of appeal proceedings he says: "This remedy [appeal procedures] was evidently extensively used by those who could afford it...but for the poor man, who could not meet the heavy expenses involved in an action before a higher court, it cannot have been practicable." What remained practicable, however, was to sue the judge if there was some indication of wilful misjudgement.

¹⁷⁶ Kaser and Hackl, *ZPR*, 520 mention the apparent efforts of the emperors to fight the arbitrariness of the predominantly incompetent and corrupt administration and to restrict their authority by a vast number of regulations; further 526-528; Jones, *Later Roman Empire*, 502 states: "Honesty and fearless independence were highly esteemed, but they were ideals rather than normal requirements. Judicial corruption was an endemic evil which the emperors were powerless to overcome." Also Dawson, *Lay Judges*, 33; Kunkel, *RG*, 130-131.

That this was their motive may be inferred from a number of legislative measures that were introduced in order to ensure civil liability of judges for specific procedural omissions. Justinian, for instance, decreed in *C* 3.1.13.6 that the party that lost the case was to be sentenced to payment of costs *quantum pro solitis expensis litium iuraverit* (at the amount confirmed by oath). If a judge failed to sentence the losing party for costs, he himself had to pay the amount in question to the winning party.¹⁷⁷ The same applied in instances of default. Where a party appeared belatedly, it had to be sentenced to paying the other party all expenses suffered in consequence of the default. Again, the judge's failure to do so made him liable for the amount in question.¹⁷⁸

It is evident that judicial liability came increasingly to operate repressively.¹⁷⁹ Thus, in post-classical law there emerged a second important aspect of judicial liability, which will be encountered throughout subsequent legal historical development: the function of judicial liability not so much as a (necessary) remedy but as a control device, as a means of ensuring judicial accountability. With the appearance of the authoritative state and a judiciary that was staffed not by citizen lay judges selected by the parties, but by imperial judicial officers, the need to control the judiciary became abundantly clear. It was realised that an ineffective and biased judiciary posed a serious threat to the proper operation of any polity.

2 3 1 State of mind

As indicated above, the general development of legal liability initially made it unlikely that judicial liability would be determined by fault. Except for the (nearly similar) passages by Gaius in *Inst* 4.5 pr, *D* 44.7.5.4 and *D* 50.13.6, there was no indication in pre-classical and high-classical law that any particular state of mind or fault on the part of the judge was required.¹⁸⁰

¹⁷⁷ *C* 3.1.13.6.

¹⁷⁸ *C* 3.1.15, see also Kaser and Hackl, *ZPR*, 532 fn61 and 632.

¹⁷⁹ Hübner, *IURA* 5 (1954), 208; Hochstein, *Obligationes Quasi ex Delicto*, 15; Steinwenter, *Iudex*, 2471; Kaser and Hackl, *ZPR*, 532. In the affirmative also Lamberti, *Labeo* 36 (1990), 264-265.

¹⁸⁰ *Inst* 4.5 pr is part of Gaius' introductory textbook *Institutiones*. Gaius belongs to the group of classical jurists who wrote in the second century A.D. It should be remembered that the passage in *Inst* 4.5 which refers to *imprudencia* is thought to have been interpolated. See above at fnn133-135.

However, a controversial passage in *D* 5.1.15.1 was adopted from the early post-classical jurist Ulpian (about 170 - 222 A.D.), where reference is made to a judge who adjudicates *dolo malo*.¹⁸¹ Can this mean that by the third century A.D. fault came to be considered essential for the determination of judicial liability? The passage states:

“Iudex tunc litem suam facere intellegitur, cum dolo malo in fraudem legis sententiam dixerit (dolo malo autem videtur hoc facere, si evidens arguatur eius vel gratia vel inimicitia vel etiam sordes), ut veram aestimationem litis praestare cogatur.”

The view of Lenel, who considered everything from the word *dixerit* onwards to be interpolated by Justinian’s compilers and consequently not authentic in Ulpian’s day, has received strong support.¹⁸² The reference to *dolo malo* which appears before the parentheses was interpreted as coming from a particular statute on suretyship, which prevents any kind of generalisation. As in the case of the interpolated parts of *Inst* 4.5 pr, *D* 44.7.5.4 and *D* 50.13.6, any reference to *dolus malus*, in other words to a generalised standard of culpability, derives from the (later) period of Justinian where “...the harmonising approach of late post-classical law recognised the classical legacy of legal liability and developed a...coherent...doctrine of

¹⁸¹ Domitius Ulpianus was one of the leading early post-classical jurists together with Aemilius Papinianus and Iulius Paulus. See Kunkel, *RG*, 114-115. About one third of all titles of the *Digest* was drawn from Ulpian. For more details see Honoré, *Ulpian*, 1-46; Jörs, *Domitius*, 1435-1509; Knütel, *Ulpianus*, 625-626.

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standards of liability based upon fault.”¹⁸³ It was only then that *dolus* and *culpa* were fully identified as cornerstones in the determination of legal liability.

The underlying development of legal liability may be outlined by three main features: Firstly, the element of moral culpability came to the fore. Influenced by Christianity and Greek philosophy, post-classical jurists stressed the individual’s subjective and ethical responsibility.¹⁸⁴ Secondly, as this development no longer permitted selective typification, generally applicable terminology and definitions had to be developed. On this basis, thirdly, *dolus* and *culpa* emerged in the law of obligations as essential components of a general concept based on fault. In light of this, it is little wonder that, to sixth century Byzantine jurists occupied with compilation of the texts of the classical jurists, any form of strict legal liability – including the liability of the judge – must have appeared highly suspect. Passages like *utique peccasse aliquid intellegitur licet per imprudentiam* (*Inst.* 4.5 pr) or, as here, *dolo malo autem videtur hoc facere, si evidens arguatur eius vel gratia vel inimicitia vel etiam sordes* (*D* 5.1.15.1) are, thus, most likely, post-classical alterations made in order to reconcile the *iudices’* strict liability of earlier classical and Republican law with the *culpa* requirements of Justinian law.¹⁸⁵ They stressed the aspect of moral blame, i.e., the judge’s reprehensible attitude or his negligent and careless handling of the lawsuit as the source of his culpability.

Scholars agree on the general position of the Justinian age that legal liability was generally based upon fault, but there have been different proposals as to the specific effects of this development on judicial liability. This divergence in late post-classical law is better appreciated if it is understood that in the *Corpus Iuris Civilis* judicial liability was not only

¹⁸³ My translation from Jörs/Kunkel/Wenger *Römisches Recht*, 238: “Erst die harmonisierende Arbeit der Spätzeit ließ die im klassischen Recht vorhandenen Ansätze zur Vereinheitlichung des Haftungsrechts viel stärker hervortreten und entwickelte ein...in seiner geistigen Struktur...völlig geschlossenes...System des haftungsbegründenden Verschuldens. See further Kaser, *RPR II*, 348: “Das Bestreben, die allgemeinen Haftungsmaßstäbe...auf Verschulden zu gründen, setzt...eine schon in spätklassischer Zeit erreichte Entwicklung fort.”

¹⁸⁴ For the influence of Greek philosophy on post-classical Roman law generally see Kelly, *Western Legal Theory*, 45-57.

¹⁸⁵ See Hochstein, *Obligaciones Quasi ex Delicto*, 22-25 with further reference to Kunkel and Albertario; Hübner, *IURA* 5 (1954), 208; Stein, *RIDA* 5 (1957), 570 ascertains: “In the final stage, the Byzantines were faced with a category whose basis they did not understand. By that time the liability of the *iudex* had been changed - probably it was first restricted to deliberately false judgements and then extended to cover false judgements given *per imprudentiam*. Thus various Byzantine scholars - who in any case would not have approved of liability without fault - added the references to the *culpa* of the defender...”.

based upon an independent specific honorarian *actio in factum* but, together with three other actions, came to be classified as a so-called quasi-delict.¹⁸⁶

2 3 1 1 Judicial liability as a form of quasi-delictual liability

One of the most important legacies of classical Roman law, which still prevails today, is the systematic classification of the law of obligations into various components. Already in the second century A.D., Gaius in his *Institutes* referred to a twofold classification of obligations, namely into *obligationes ex contractu* and *obligationes ex delicto*.¹⁸⁷ In a later classification, also ascribed to Gaius, a threefold system emerged, where the so-called *obligationes ex variis causarum figuris* were added.¹⁸⁸ In Justinian's *Digest*, contracts¹⁸⁹, delicts¹⁹⁰, quasi-contracts¹⁹¹ and quasi-delicts¹⁹² are discussed directly after reference is made to this threefold scheme of obligations. Thus, it is safe to conclude that quasi-contracts and quasi-delicts were a subdivision of the *variae causarum figurae*.¹⁹³ The category of quasi-delicts covered various types of liability which for one reason or another did not fit into the category of (true) delicts. Either causation in such instances was indirect rather than direct as required at this stage of development of Aquilian liability, or the pre-Justinian sources which were to be included in the *Corpus Iuris* did not require fault for liability. In any case, it is as difficult for modern Romanists as it was for Justinian's compilers to find a truly satisfactory explanation or a common link for the lumping together of these diverse actions. Not surprisingly, a wealth of different proposals has been advanced in the literature. Particularly problematic has been the reconciliation of the action against the *iudex, qui litem suam fecit* with the other three quasi-delictual actions.

¹⁸⁶ The other actions belonging to the group of *obligationes quasi ex delicto* were the *actio de deiectionis vel effusis* (*Inst* 4.5.1 and *D* 44.7.5.5), the *actio de posito vel suspenso* (*Inst* 4.5.1-2 and *D* 44.7.5.5) and the *actio de damno aut furto adversus nautas, caupones, stabularios* (*Inst* 4.5.3 and *D* 44.7.5.6).

¹⁸⁷ See *Gai* 3.88.

¹⁸⁸ *Gai* *D* 44.7.1.pr.

¹⁸⁹ *D* 44.7.1.1 *et seqq.*

¹⁹⁰ *D* 44.7.4.

¹⁹¹ *D* 44.7.5.1-3.

¹⁹² *D* 44.7.5.4-6.

¹⁹³ Generally see Zimmermann, *Law of Obligations*, 10-15 with further references and his *Effusum vel Deiectum*, 311-312; Van Zyl, *Roman Private Law*, 250-251; Kaser, *RPL*, 24-25.

To answer to the question of how Justinian rationalised these varying actions in the *Corpus Iuris Civilis*,¹⁹⁴ some writers argue that initially the common denominator was the high-classical notion of 'typical *culpa*'. Typical *culpa* being their point of departure, these authors are certain that sixth century Byzantine jurists simply superimposed a generalised fault criterion on the liability of the judge and the other quasi-delicts. More precisely, this was a concept of negligence or *culpa* in the narrow sense.¹⁹⁵ In the eyes of these scholars, *culpa* (negligence) became the essential characteristic of all quasi-delicts. Owing to the apparent desire of Justinian to (re-)systematise the law in its entirety along the lines of developed classical law, *dolus* became indicative of the 'true' delicts, whereas *culpa* became indicative of the quasi-delicts. Thus, in the light of this new system a judge was held quasi-delictually liable for wrong judgements due to *imprudencia* (*Inst* 4.5.pr, *D* 44.7.5.4, *D* 50.13.6), which was equated with *culpa* or negligence, and delictually liable for wrongs due to *dolus* (*D* 5.1.15.1).

Reluctance to accept such a clear cut distinction in Justinian law between delicts exclusively committed *dolo malo* and quasi-delicts (including the liability of the judge) committed only by *culpa* appears in another approach to the subject.¹⁹⁶ The most striking argument in favour of this alternative view is that in Justinian law *dolus* and *culpa* remained the basis of delictual liability under the *lex Aquilia*. Why then did the compilers retain a group of quasi-delicts where liability was exclusively for *culpa*? Or, to put it differently: In the light of Justinian's efforts to (re-)systematise Roman law, how is it that Aquilian liability in particular formed the most prominent exception to this supposedly systematic scheme?

¹⁹⁴ However, some proposals do not specifically deal with this question of appearance of quasi-delictual liability in Justinian law (which is probably considered by these writers to be based on fault anyway) but concentrate on the classical foundations of the various actions that may have influenced Justinian's compilers in identifying them as quasi-delicts. Reference could be *inter alia* to Buckland, *Manual*, 331-332 and *Textbook*, 599 who considered vicarious liability as the common link. This also appears to be Lee's position in his *Elements* at 401 when he states that the law creates in all quasi-delicts (apparently including the judge who makes the case his own) a liability "...though the defendant may in fact not be to blame." Others, for instance Borkowski in his *Textbook*, 335 choose a different approach to explain the common link of the quasi-delicts. Borkowski argues in favour of the view that quasi-delicts covered situations where the defendant was entrusted with the 'safety' of a thing. For instance to make an apartment safe against anything falling on the street, or to bring the lawsuit before him to a safe end. Again, others like Thomas in *Textbook*, 377 and *Institutes*, 281 have pointed out that reasons of public policy linked the four actions together since they operated as a kind of insurance for the victim. A somewhat despondent view is the denial of any common denominator. See Wolodkiewicz, *RISG* 14 (1970), 194-197.

¹⁹⁵ Kaser and Hackl, *ZPR*, 196 fn38 and Mayer-Maly recently again in *TR* 60 (1992), 194; Kelly, *Roman Litigation*, 114. Any reference to *culpa* in the following section is intended to equate with negligence.

Another opinion is that the compilers of the *Corpus Iuris Civilis* remained aware of some kind of peculiarity in the liability of the *iudex* and the other quasi-delicts. Accordingly, the quasi-delicts were not forms of Aquilian liability. Consequently, they refrained from classifying the quasi-delicts under an ‘extended’ *actio legis Aquiliae* as delicts committed with *culpa*. However, under the overwhelming influence of culpability in the law of obligations, they were unable to value these instances for what they really were: examples of strict liability. Hence, so the argument goes, the compilers chose a *via media*. By somewhat technical devices, namely by including formulations of *culpa* or of irrefutable presumptions of fault, the liability of the *iudex, qui litem suam fecit*, and the other instances of quasi-delictual liability were, regardless of their initial outward appearance, adjusted to the prevailing system of liability for fault.¹⁹⁷ Thus the formulations of *culpa* that appeared were those interpolations identified in the passages on judicial liability discussed above. And in the other cases of quasi-delicts, particularly the liability of shippers, stablekeepers and innkeepers, the defendants were presumed to have been negligent in the choice or supervision of their employees (*culpa in eligendo*) or in their occupation of the premises (*culpa enim penes eum est. Nec adicitur culpa mentio*).¹⁹⁸

On one point all contributors agree, however: From the enactment of the *Corpus Iuris Civilis*, *culpa* in one way or another became the basis of the *obligationes quasi ex delicto*, including of course the liability of the judge. Since it was particularly the *Corpus Iuris Civilis* through which Roman law was received in high medieval Italy and later in large parts of Europe, judicial liability, therefore, came to be determined by fault and not by strict liability.¹⁹⁹

¹⁹⁶ Hochstein, *Obligationes Quasi ex Delicto*, 24-26; Stein, *RIDA* 5 (1957), 570; Hübner, *IURA* 5 (1954), 203.

¹⁹⁷ Apart from the authorities quoted above, this opinion has been recently affirmed by Lamberti, *Labeo* 36 (1990), 265-266. Zimmermann, *Effusum vel Deiectum*, 313 observes a similar tendency with regard to another quasi-delict, i.e., the *actio de effusis vel deiectionis*: “...im justinianischen Recht...stellen wir zwei bemerkenswerte Neuerungen fest. Auf der einen Seite wird ein dem klassischen Klagerecht fremdes Verschuldensmoment unter die Haftungsvoraussetzungen geschmuggelt. Diese Tendenz zur Subjektivierung klassischer Haftungsformen ist typisch für Justinian...”.

¹⁹⁸ *D* 9.3.1.4.

¹⁹⁹ See also Zimmermann, *Effusum vel Deiectum*, 313: “Die Erkenntnis dieser Zusammenhänge [that quasi-delictual liability initially was strict] wird allerdings dadurch erheblich verdunkelt, daß die Kompilatoren nicht nur bei der *actio de effusis vel deiectionis*, sondern auch bei den anderen drei Quasidelikten das Zurechnungskriterium der *culpa* ins Spiel gebracht haben: unbekümmert sowohl um die Logik der Abgrenzung zwischen Quasidelikten und echten Delikten.”

2 3 1 2 Culpa and dolus

Two further aspects deserve attention. What exactly did *culpa* and *dolus* imply as degrees of liability?²⁰⁰

If one studies the relevant sources, including the interpolated ones, the reference is not to *culpa*, but on the contrary to *imprudentia*. *Imprudentia* in the context of the relevant sources has been translated *inter alia* as imprudence (Borkowski), lack of foresight (Frier), ignorance (Sandars) or error (Thomas). The most apt translation appears generally to be carelessness. Closely related to *imprudentia* is *imperitia*, appropriately translated as inexperience or lack of expertise. Roman law covered a number of instances where liability arose from *imperitia*. For instance, a doctor was liable when he operated unskilfully or caused the death of a patient by wrong use of a drug. Whereas in classical law some of these examples were considered as a special form of liability for *custodia*, it is evident that by the time of Justinian *imperitia* came to be equated with *culpa*: *imperitia culpa adnumeratur*.²⁰¹ It is interesting that, except for the passage which relates to the liability of the *iudex*, the term *imprudentia* was not used as indication of a certain state of mind anywhere in the *Corpus Iuris Civilis*. Beyond doubt, however, the principle of equation applied to the liability also of the *iudex*; in other words, *imprudentia culpa adnumeratur*. Thus, in practice, liability of the *iudex* arose for negligence.²⁰²

At the other side of the spectrum, apparently, was intention. It must be said that in lay terms *dolus* originally meant trickery and deception. In legal terminology, however, we are faced with a more refined concept of *dolus*, namely *dolus malus* and *dolus bonus*. Only by means of

²⁰⁰ Kaser, *RPR I*, 505 and 511 points out the ambiguity of the term *dolus*. The German pandectist Sintenis, *Civilrecht*, § 22.2 fn9 once wrote: “*Dolus* has such a variety of meanings and legal consequences...that it becomes quite obvious: a general treatment of the term is practically impossible...”. My translation.

²⁰¹ *Inst* 4.3.7. Other instances included the case of a muleteer who, from inexperience, could not control his herd sufficiently to prevent their running over someone’s slave; or the similar case of a horse rider whose horse bolted (*Inst* 4.3.8); or, under the *locatio conducto*, the case of a locator who offered to perform a service without being competent for it (Cels./Ulp. D 19.2.9.5; Ulp. D 19.2.13.5 or Ulp. D 9.2.27.29). Generally see Scott, *Imperitia Culpa Adnumeratur*, 130-133; Zimmermann, *Law of Obligations*, 386, 397-398 and 1009 with further references; Van Zyl, *Roman Private Law*, 305 fn211 and 341 fn347; Kaser, *RPR I*, 509 fn46 and 47, *RPR II* 352 fn41; Jörs/Kunkel/Wenger *Römisches Recht*, 237.

²⁰² It has also been interpreted as *culpa levis in abstracto* (Van Warmelo).

the attributed *malus* did the act committed *dolo* become a legally culpable act.²⁰³ It is the legal meaning of *dolus* that is of interest here. By the time of early post-classical law, *dolus malus* had gained a threefold meaning, even though as Fritz Schultz has pointed out, to some degree “...the boundaries of the conception remained fluid...”²⁰⁴

In the context of the *bonae fidei iudicia*, *dolus malus* was the antonym of *bona fides*. Hence, a debtor was liable for an intentional breach of good faith. Originally, this probably meant liability for fraud or deceit, but it became apparent later that the *bona fides* granted a much wider discretion. Thus *dolus malus* (as the antonym) went beyond its original meaning and could entail any behaviour outside the limits of decency and the ethical demands made of a Roman citizen; in other words: infidelity.²⁰⁵

Dolus was also referred to as an essential requirement of the *actio de dolo*:²⁰⁶ in the first century B.C., *dolus* was introduced by the *praetor* as a specific delict, a so-called praetorian delict. By means of this subsidiary and penal action, a person was enabled to claim compensation for the damage suffered because of another's fraud. Here, *dolus malus* initially had the meaning of false pretences, of trickery and, in particular, simulated behaviour.²⁰⁷ Later, however, the meaning of *dolus* was extended to include instances where a person was

²⁰³ For instance, a stratagem was regarded as *dolus bonus*. See Näf-Hofmann, *Actio de Dolo*, 1-2; Zimmermann, *Law of Obligations*, 669 fnn136-139. Further Schultz, *Classical Roman Law*, 606; and Van Warmelo, *Principles of Roman Civil Law*, 278, who rightly observes: “The main point is that everyone knows what fraud is, but to describe it precisely is extremely difficult.”

²⁰⁴ Schulz, *Classical Roman Law*, 606. This appears also from Kaser, *RPR I*, 628; Kaser, *RPL*, 60 (*actio doli*), 188 (*bona fidei iudicia*), 249 (delictual obligations); Jörs/Kunkel/Wenger *Römisches Recht*, 237; Siber, *Römisches Recht*, 234; Näf-Hofmann, *Actio de Dolo*, 2; Dernburg, *Pandekten*, § 86 I; Sintenis, *Civilrecht*, § 22.2 fn9.

²⁰⁵ Kaser, *RPR I*, 509: “Der Verstoß gegen die *bona fides* wird als *dolus malus* gekennzeichnet. Der Sinn dieses Ausdrucks geht hier über die Ausgangsbedeutung ‘Arglist, Betrug’ weit hinaus und schließt jede Unlauterkeit ein...”, Kaser, *RPL*, 188-189; Jörs/Kunkel/Wenger *Römisches Recht*, 235; Van Zyl, *Roman Private Law*, 263 fn51. Note however, that for juristic acts within the law of contract (and quasi-contract) that were based upon the *strictum ius* (as opposed to the *bona fidei iudicia*) a debtor was liable merely for the wilful non- or mal-performance of an obligation without extension of this to the harm or loss to the creditor. See Kaser, *RPR I*, 506 and 511.

²⁰⁶ According to Schulz, *Classical Roman Law*, 605 the classical name of the action was *actio de dolo* and not *actio doli*.

²⁰⁷ C. Aquilius Gallus (the promoter of the *actio de dolo*) defined *dolus malus* as *cum esset aliud simulatum, aliud actum* (Cicero, *De Officiis* 3.14.60) and Servius Sulpicius understood *dolus malus* as *machinationem quandam alterius decipiendi causa, cum aliud simulatur et aliud agitur* (Ulp. D 4.3.1.2). Thus, the essential aspect was pretending to do one thing and doing (or intending) another, which amounts to simulation. See also Zimmermann, *Law of Obligations*, 665; Schulz, *Classical Roman Law*, 605-607; Van Warmelo, *Principles of Roman Civil Law*, 228; Thomas, *Textbook*, 374; Borkowski, *Textbook*, 330-332; Näf-Hofmann, *Actio de Dolo*, 4-7.

openly deceived.²⁰⁸ Thus, under the *actio de dolo*, *dolus malus* was a delict in its own right and had the meaning of fraud, *bedrog* or *Arglist/Betrug*, although in specific circumstances it came close to the meaning of *dolus* within the *bona fidei iudicia*, namely to infidelity.²⁰⁹

Thirdly and finally reference was to *dolus* within delictual liability (*actio legis Aquiliae*, *actio iniuriarum*, *actio furti*): from early post-classical law *dolus malus* appeared increasingly as the counterpoint to *culpa* (negligence). Thus, *dolus malus* (and *culpa*) emerged as standards of liability. This meaning of *dolus malus* to some limited extent is comparable with our modern notion of intention, *opset* or *Vorsatz*, and, it is worth noting, applied regardless of any open or simulated form of deceit.²¹⁰

At the time of the compilation of the *Corpus Iuris Civilis*, the various components of this threefold scheme had certainly been modified. Thus, the course of development, which we have discussed in detail with regard to judicial liability, may now be seen in broader perspective: Except for the specialised and more restricted *actio de dolo*, the terms *dolus malus/culpa* were used to assign to the various contractual, quasi-contractual, delictual and quasi-delictual obligations a coherent system of legal liability. In consequence of a better

²⁰⁸ D 4.3.1.2: "*Labeo autem posse et sine simulatione id agi, ut quis circumveniat: posse et sine dolo malo aliud agi, aliud simulari, sicut faciunt, qui per eiusmodi dissimulationem deserviant et tumentur vel sua vel aliena: itaque ipse sic definiit dolum malum esse omnem calliditatem fallaciam machinationem ad circumveniendum fallendum decipiendum alterum adhibitam.*" According to Labeo's definition, a person can be deceived without simulation, that is without being misled by a pretence, but by means of any conceivable cunning, tricky or contrived behaviour, i.e., openly. See Zimmermann, *Law of Obligations*, 665; Schulz, *Classical Roman Law*, 606; Näf-Hofmann, *Actio de Dolo*, 3, 18-20 and 45-47.

²⁰⁹ Zimmermann, *Law of Obligations*, 668: "A person charged with *dolus* had not necessarily employed deceit and trickery, but had infringed one of the standard principles by which to conduct an honest life: fidelity."; Kaser, *RPR I*, 511 and 628; Jörs/Kunkel/Wenger *Römisches Recht*, 232-233, 236; Van Zyl, *Roman Private Law*, 350; Näf-Hofmann, *Actio de Dolo*, 2-4. In this sense *dolus malus* had a very wide range of applicability. Rightly, therefore, Frier, *Casebook*, 332 makes the point that the *actio de dolo*'s subsidiary position was badly needed in order to restrict its application. The actual instances of application had to be kept low since it was a too wide open a 'door' to liability at the outset. This view is confirmed by Zimmermann, *Law of Obligations*, 664.

²¹⁰ Van Zyl, *Roman Private Law*, 333; Kaser, *RPR I*, 505 and 511: "...*dolus malus* [hat] im Deliktsbereich die...Bedeutung...des deliktischen Vorsatzes als des Willens, den anderen durch die Tat zu schädigen..."; Jörs/Kunkel/Wenger *Römisches Recht*, 231-232: "*Culpa* bedeutete zunächst Verschulden schlechthin, umfaßte Vorsatz und Fahrlässigkeit, wurde jedoch später zunehmend in Gegensatz zu *dolus* gesetzt und bezeichnete jetzt das nicht dolose Verhalten." See also Kaser, *RPL*, 249; Siber, *Römisches Recht*, 234; Van Warmelo, *Principles of Roman Civil Law*, 216 and Prichard, *RPL*, 420 who observes that: "*Dolus* as a distinct delict must not be confused with *dolus* as a ground of liability in certain delicts, where it means wilful intent..."

worked out concept of legal responsibility (fault at large), as well as the emergence of moral culpability as the decisive criterion, *dolus malus* appeared as the intentional committing of a wrong. Thus, at the final stage of Roman law we are left with a twofold meaning of *dolus malus*: the more general one of a required state of mind and a specific one under the *actio de dolo*.²¹¹ It will be apparent in due course that this twofold meaning of *dolus malus* in the *Corpus Iuris Civilis*, was to cause a considerable amount of confusion, particularly in the Roman Dutch law of judicial liability.

If, finally, we are to take this process of modification into account and apply this twofold meaning of *dolus malus* to the liability of the *iudex*, it may be argued that *dolus malus* now had the meaning of a state of mind. Thus a judicial wrong committed *dolo malo* was a deliberate infliction of damage on a party due to a wrong judgement without the more narrow characteristics that applied under the *actio de dolo*. This view is based upon two arguments. First, it was generally accepted that the *actio de dolo* was subsidiary to the *actio legis Aquiliae* (*actio subsidiaria*).²¹² Secondly, it may be argued that with regard to judicial liability *dolus* operated in contrast to *imprudentia* as a particular state of mind and not as a delict in its own right. *Dolus* therefore was not used in its more narrow sense of fraud or deceit.²¹³

In conclusion, it may be said that in post-classical Roman law judicial wrongs committed with *imprudentia* (quasi-delicts) were actionable under an *actio in factum*, whereas deliberate judicial wrongs (delicts) were actionable under the *actio legis Aquiliae* and not under the *actio de dolo*.

²¹¹ Näf-Hofmann, *Actio de Dolo*, 2 and at 47 she makes the point that: "Für die Klassik zeigt sich folgendes Bild: enger, begrenzter *dolus*-Begriff innerhalb der *actio de dolo*, und langsame Ausweitung des *dolus*-Begriffs außerhalb der Klage."

²¹² Kaser, *RPR I*, 627 and *RPR II*, 91; Schulz, *Classical Roman Law*, 607; Näf-Hofmann, *Actio de Dolo*, 8-9; Van Warmelo, *Principles of Roman Civil Law*, 227; Prichard, *RPL*, 420; Borkowski, *Textbook*, 331.

²¹³ Kaser, *RPR I*, 628 states: "Bei den übrigen Maßstäben für die vertragliche (und quasivertragliche) Haftung bedeutet der *dolus*, wie in den erwähnten Strafgesetzen, den 'Vorsatz', das Wissen und Wollen..., häufig gegenüber der culpa als (qualifizierter) Fahrlässigkeit. Darauf, ob die bewußte und gewollte Schädigung offen oder auf listigen Umwegen erreicht wird, kommt es dabei nicht an."

232 Causes of liability

Having ascertained that judicial liability by the time of the *Corpus Iuris Civilis* was indeed based on fault, the question that remains is: For what sort of judicial wrongs could a late imperial *iudex* could be held liable? Was liability again confined to cases where the *iudex* had neglected a basic requirement of procedure? Or, was the scope of the liability of the judge extended to errors of substantive law? The most radical view has been advocated by D'Ors, who argues that throughout Roman law judicial liability was for procedural errors only.²¹⁴ Kelly also appears to restrict the scope of liability, albeit to a lesser degree than D'Ors. In his eyes:

“...[I]t is inconceivable that, even in the sixth century A.D., when judges had for probably three centuries been paid magistrates organised in a bureaucratic pyramid, there could possibly have been an action...intended to apply to *every* wrong judgement, in other words that each judge was more or less an insurer of the parties appearing before him against *any* mistake *whatsoever*.”²¹⁵

Again, for practical purposes, Kelly would limit the *iudex*'s liability to instances of wrong application of rules of law, not necessarily those of faulty exercise of discretion.²¹⁶

A different view is held by MacCormack. He argues that by the time of post-classical law, the scope of liability had been extended to errors of substantive law. He derives his argument from an analysis of the passage in *D* 5.1.15.1 which refers to a judgement *in fraudem legis*.²¹⁷ Unlike the prevailing opinion, he regards the notion of *fraus legis* in *D* 5.1.15.1 to have universal application. Broadly defined, *fraus legis* means a violation of a *lex*.²¹⁸ Clearly, this no longer has anything in common with procedural errors. On the other hand, it remains a

²¹⁴ D'Ors, *SDHI* 48 (1982), 377-378, also Metzger, *New Outline*, 153; Pugsley, 1969 *IJ*, 354.

²¹⁵ *Roman Litigation*, 114 (my italics). However, the fault requirement alone would prevent this consequence.

²¹⁶ *Ibid.*

²¹⁷ Note, however, that MacCormack, *Liability of the Judge*, 21 fn60 does not agree with the prevailing opinion that this passage is interpolated. Thus in his eyes it is genuinely classical. Nonetheless, one may make use of his comments to describe the Justinian period, since he considers this to be the position of the law up to the sixth century (at 27).

²¹⁸ Which, according to MacCormack, *ibid*, included a *senatus consultum* or imperial constitution. More precisely, one may define *fraus legis* as a direct (contravention of the letter) or indirect (contravention of the spirit) violation of a *lex*. MacCormack, *ibid*, 27, as well as at 23 and Gordon, *Temis* 21 (1967), 305 argue that a judge would only be held liable where he was shown to be (*dolo malo*) objectively wrong and not merely wrong as a matter of opinion. Only a judgement that went against the spirit of the statute and also the letter of the law was objectively wrong. Decisions that were against the spirit but within the letter of the law had to be considered an opinion or, to put it differently, a matter of (tolerable and not actionable) interpretation by the judge.

rather narrowly defined “...particularly grave piece of misconduct by a judge.”²¹⁹ From this starting point, MacCormack combines the requirement of a judgement *in fraudem legis* with the (typical) instances of judicial wrongdoing mentioned in *D* 5.1.15.1: Liability could arise only where a judge either violated the law or misjudged out of partiality, corruption or hostility.

Other scholars have gone a step further. They accept liability for procedural errors as well as for errors of substantive law where clear ‘extrinsic’ proof could be offered as to a wilful and particularly reprehensible act, for instance in cases of bias or corruption, without paying special attention to *fraus legis*.²²⁰ Other writers agree but stress the point that, besides procedural errors, so-called *Rechtsirrtümer*, which are errors of law (supposedly due to lack of knowledge), were to be included in the liability of the *iudex*.²²¹

In my view, judicial liability was, most likely, extended to errors of substantive law under post-classical law. This was due, first, to the emergence of the extraordinary forms of proceedings and the possibility of appeal. For, it is difficult to see, technically, how an advanced system of appeal and review (as appeal procedures under the extraordinary *cognitio* proceedings doubtless were) could operate if judges *a quo* did not in some way or the other substantiate their judgements or indicate on what findings of fact or law the judgement was based on. Else, on what points could the appellant base his appeal?²²²

²¹⁹ MacCormack, *Liability of the Judge*, 23.

²²⁰ So does MacCormick, *Acta Juridica* 20 (1977), 155-157; Birks, *TR* 52 (1984), 385 accepts this view, stressing however the practical difficulties in proving wilful misjudgement: “But this proposition [judges are liable even for deliberately wrong applications of law or findings of facts] would be more theoretical than practical...because of the great difficulty in proving that a *iudex* had been guilty of bad faith.” Note further Schrage, *Legal History* 17 (1996), 103.

²²¹ Hübner, *IURA* 5 (1954), 203 fn16 does not differentiate between pre-classical or high-classical law and the development of post-classical law. Therefore this criterion seem to apply to all periods.

²²² The issue of Roman judges’ motivation of their judgements has been debated. Overall, at least under the ordinary system of formulary proceedings, judges were not obliged to state the reasons for the judgement. However, they occasionally did so. Under the extraordinary *cognitio* proceedings and in post-classical Roman procedure, this rule prevailed, albeit to a lesser degree. See Kaser and Hackl, *ZPR*, 371, 495 and 609. More recently, this view seems also to have been accepted by O F Robinson in her article ‘The ‘*iudex qui litem suam fecerit*’ explained’ in *ZSS (RA)* 118 (1999) forthcoming, where she argues that since the *cognitio extraordinaria* provided for a system of appeals (as distinguished from the situation under the system of formulary proceedings) judicial liability now could be based on allegations of incompetence, that is on substantially wrong judgement because now the (second) judge could hear and an appeal and investigate fully into the matter, including the judge’s *a quo* reasons.

This is also to be concluded from an article by K Visky which deals with the question of whether or not judgements in Roman law were motivated by judges.²²³ Visky argues that, from the days of the extraordinary forms of procedure, a strong tendency (albeit not a written rule) prevailed to motivate judgements.²²⁴ He concluded, further, that there were additional means for an appeal court to evaluate the findings of fact and law by the court *a quo*. He identified two, namely a record (*acta*) on the basis of which the superior court could easily identify how the judge *a quo* found and assessed the relevant questions of fact and law²²⁵; and secondly, the frequent consulting with renowned Roman jurists on points of law. The latter gave their answers in so-called *responsa*. In fact, once a jurist had received the honour of being patented by an emperor with the so-called *ius respondendi*, he spoke with the “leader’s authority” (*ex auctoritate principis*).²²⁶ Evidently, this made it almost obligatory for any judge to follow the opinion expressed in a *responsa*. The *responsa*, argues Visky, were included in the file of the case and the appellate court was thus able to follow the legal arguments the court *a quo* applied (or did not apply).²²⁷ Finally, it appears from Kaser and Hackl’s *Zivilprozessrecht* that under the high-classical *cognitio* procedure appellants did not have to adduce the grounds for the appeal on petitioning for appeal. However, it is obvious that when the actual appeal was heard this had to take place at the latest.²²⁸

On balance, thus, the main argument of D’Ors and especially Birks, i.e., the lack of knowledge of intrinsic errors on which an action against a judge could be based, may be void for the post-classical period. A second argument which may be raised in favour of a ‘broad’ view of judicial liability in post-classical law is based on the tendency of the emperors to use judicial liability as a (indirect) means of disciplining judges. Only a broad view of liability could support this objective. It appears that Visky is thinking along these lines when he cites a

²²³ Visky, *RIDA* III ser. 18 (1971), 735.

²²⁴ *Ibid.* at 759: “Jedoch kann man konstatieren, daß der Richter - infolge der Entwicklung der Lebensverhältnisse und der ansteigenden Verwicklung des Geschäftsverkehrs - in vielen Fällen sich bewogen hat, sich mit der Entscheidung des Rechtsstreits nicht zu begnügen, sondern außerdem mindestens in groben Zügen auch über die Tatsachen und über die angewandten Rechtsnormen einige Erklärungen zu geben, die ihm zu seiner Urteilsfällung führten.” Tendency also affirmed for the *cognitio* form of proceedings by Kaser and Hackl, *ZPR*, 494 fn8a.

²²⁵ With regard to the *acta* see Kaser and Hackl, *ZPR*, 482.

²²⁶ Dawson, *Oracles*, 107-109.

²²⁷ Visky, *RIDA* III ser. 18 (1971), 758-759.

²²⁸ See Kaser and Hackl, *ZPR*, 507: “Das appellare oder provocare ist in mündlicher oder schriftlicher Form möglich...Dagegen ist die Angabe der Berufungsgründe nicht vorgeschrieben. Diese können die Parteien während des Prozesses wechseln...”. See also Visky, *RIDA* III ser. 18 (1971), 754-755.

case where a judge's findings were not quite correct.²²⁹ According to Visky, this could occasion a lack of confidence in the late imperial judiciary and motivation of judgements would, consequently, be a useful means of judicial control.²³⁰ Visky obviously had appeal procedures only in mind, but this notion could also apply to an action for civil liability against a judge.

2 4 Damages

At the earliest stage of development, the Republican judge, if convicted, was liable to the party injured for the exact amount claimed by the party under the original action (*quanti ea res*).²³¹ *Quanti ea res fuit*, as it is better termed, was a purely objective standard. But a purely objective standard of assessment of damages does not necessarily satisfy a more sophisticated sense of justice.²³² Thus, we see the encroachment of more subjective criteria on the objective standard of *quanti ea res est*. These subjective criteria came to be included under so-called condemnations in *id quod interest*.

For instance, in an action under the *lex Aquilia* the value of an animal was now still assessed, but the loss suffered by the individual plaintiff was given more weight.²³³ Applied to the liability of the judge, from the time when the *iudex* became liable in terms of an independent *actio in factum* under the edict, damages were no longer confined to the objective value of the case a party had lost due to the judge's wrong decision but, instead, were calculated more in accordance with the actual damages suffered in consequence of the *iudex*'s judgement. These damages could have been less or more extensive than the set amount of the initial action, and, further, may have involved loss of goodwill. However, *id quod interest* did not mean that a

²²⁹ Visky, *ibid.* at 753-754, included a discussion of a late imperial (583) legal instrument from Syene that entailed the discussion of a decision of either a *iudex pedaneus* or a *defensor civitatis* (both inferior court judges, see the text above at fn91) named Markos. The judge gave his decision in a claim to an inheritance in favour the defendant even though the plaintiff produced evidence that the parties had agreed on an amicable agreement in favour the plaintiff.

²³⁰ *Ibid.* at 759: "Jedoch hätte eine Motivierung im Kognitionsverfahren schon mehr erforderlich sein können. Die Parteien könnten nämlich auf ihrem Richter, der ein Beamter war, eben infolgedessen weniger Vertrauen haben und - noch dazu - die von solchen Richtern gefällten Urteile manchmal nicht tadellos waren."

²³¹ Hübner, *IURA* 5 (1954), 207; MacCormack, *Liability of the Judge*, 5 and the authorities referred to at fnn6 and 25.

²³² Erasmus, *THR-HR* 38 (1975), 107.

²³³ *Ibid.*, 107.

plaintiff in an action against a judge would recover his total loss or his full *interesse* (in today's sense of the word). This formulation indicated merely the freedom of the judge (in the action against the initial *iudex*) to exceed the objective value where this appeared to him to be necessary, that is where the objective value had to be considered inadequate in the light of the damages the party had effectively suffered.²³⁴

Thus, generally *id quod interest* granted some discretion to the judge. However, this discretion was limited by the circumstances of the specific *actio* and its application to the case. Unrestricted discretion was granted to the judge only under the actions for condemnation in *quantum iudici (bonum et) aequum videbitur*. The latter applied to the liability of the *iudex*. The (second) judge was instructed by the formula to condemn in *quantum de ea re aequum religioni iudicantis videbitur, poenam sustinebit*.²³⁵

In post-classical law, however, it appears that damages were measured differently, at least in part. In cases of liability for *dolus*, damages were assessed according to the formulation *vera aestimatio litis*, which at this (later) stage of the development of Roman law has to be interpreted in a wide sense. Liability here was for all damages direct and indirect, incurred through the judge's act, including the costs of appeal. In other words, the total *interesse*.²³⁶

In instances of liability for *culpa*, damages continued to be assessed in accordance with the high-classical rule.²³⁷

²³⁴ *Ibid*, 108; Medicus, *Id Quod Interest*, 234, 329-330.

²³⁵ *D* 50.13.6; *D* 44.7.5.4 and *Inst* 4.5 pr. See further Kelly, *Roman Litigation*, 115; Kaser and Hackl, *ZPR*, 318-319 fn51 with further references; MacCormack, *Liability of the Judge*, 23 and 26; Hübner, *IURA* 5 (1954), 207-208; Lenel, *Edictum Perpetuum*, 169; Weiß, *Institutionen*, 464.

²³⁶ *D* 5.1.15.1 Further Hübner, *IURA* 5 (1954), 207; MacCormack, *Liability of the Judge*, 23. This was precisely the starting point of the Italian medieval jurists in the assessment of damages for *dolo* misjudgements. See Engelmann, *Wiedergeburt*, 354.

²³⁷ Hübner, *IURA* 5 (1954), 207.

3 JUDICIAL LIABILITY FOR INFRINGEMENTS OF PERSONALITY RIGHTS

Turning now to the development of judicial liability for infringements of personality rights, historically, the delict of *iniuria* (*contumelia*) had its origins in the XII Tables.²³⁸ In this sense, *iniuria* became a delict in its own right, not to be confused with the broader meaning of *iniuria* as indicative of wrongfulness, for instance under the *actio legis Aquiliae* where *iniuria* comprised wrongfulness and fault (*damnum iniuria datum*).²³⁹ Initially, the XII Tables made provision only for various forms of infringements of physical integrity. Thus, *membrum ruptum* (tab. VIII 2), the most severe form of early *iniuria*, which comprised severance, mutilation or permanent disablement of a limb, led to retaliation unless the parties had agreed to a pecuniary compensation (*pactum*). For *os fractum* (tab. VIII 3), a less serious case of fracturing a bone, punishment was not retaliation but a fixed penalty payable by the culprit. Slight forms of physical harm appear to have been included under the concept of *iniuria* (tab. VIII 4). Examples were slaps in the face, kicks, etc. In cases like these, the culprit had to pay a penalty of 25 *asses*.²⁴⁰

By the second century B.C., the rigid regulations of the XII Tables had been superseded by a number of edicts which made the delict of *iniuria* more flexible and extended its scope considerably.²⁴¹ By means of the edict *de iniuriis aestumandis*, the *praetor* decided that for cases of *iniuria* a jury (*recuperatores*) had to estimate *bonum et aequum* the penalty (*taxatio*) in accordance with the bodily infringement complained of. Soon praetorian edicts covered

²³⁸ The literature on the development of the Roman *actio iniuriarum* is vast. Only a selection of the works (predominantly those accessible in South Africa) is given here. The most recent work in this field is Walter, *Actio Iniuriarum*. See further Zimmermann, *Law of Obligations*, 1050-1062; Burchell, *Law of Defamation*, 3-10; Midgley, *Delict*, 9-10; McQuoid-Mason, *Law of Privacy*; Amerasinghe, *Defamation*; De Villiers, *Law of Injuries*. Further, a number of dissertations can be referred to, namely Neethling, *Die Reg op Privaatheid*; Davidstz, *Animus Iniuriandi*; Pauw, *Persoonlikheidskrenking*; Ranchod, *Foundations*. Finally there are some of the standard works of Kaser, *RPR I*, 623-625, further *RPR II*, 439 and his *RPL*, 256-257; Liebs, *RR*, 285-293; Honsell, *Römisches Recht*, 152-153; Van Zyl, *Roman Private Law*, 343; Van Warmelo, *Principles of Roman Civil Law*, 220-222; Borkowski, *Textbook*, 322-328.

²³⁹ Zimmermann, *Law of Obligations*, 1050; Walter, *Actio Iniuriarum*, 51 fn47; Midgley, *Delict*, 9; Honsell, *Römisches Recht*, 147.

²⁴⁰ Walter, *Actio Iniuriarum*, 42-44; Burchell, *Law of Defamation*, 3-5; Zimmermann, *Law of Obligations*, 1050-1053; Ranchod, *Foundations*, 1; Pauw, *Persoonlikheidskrenking*, 1; Kaser, *RPL*, 256; Liebs, *RR*, 286-288; Honsell, *Römisches Recht*, 152.

²⁴¹ By the time of the late Republic, the sum of 25 *asses* was hardly adequate to compensate a victim. The *as* had depreciated considerably and was only a small and worthless copper coin. See Zimmermann, *Law of Obligations*, 1052; Liebs, *RR*, 289.

other forms of *iniuria* besides physical harm. Thus, in about 150 B.C., the so-called *convicium* (a certain form of defamation in public) came under the provision of the *praetor*'s general edict, as did the edicts *de ademptata pudicitia* (with a view to protecting the good name of a woman or an adolescent), *ne quid infamandi causa fiat* (with a view to protecting one's reputation) and *servum alienum verberare* (with the purpose of protecting a slave owner's good name, which could have been damaged by the beating or torturing of the slave).²⁴² By the time of classical law, the Romans had combined the various elements of the praetorian edicts under the generic term *iniuria* which covered both infringements of physical integrity as well as infringements of non-physical interests. The action available in these cases became known as the *actio iniuriarum*.

Classical jurists managed to crystallise a number of general requirements, which had to be met before a claim could succeed. First of all there had to be an injury, also referred to as *contumelia*: "...specialiter autem iniuria dicitur contumelia...".²⁴³ *Contumelia* in the widest possible sense indicated any "...outrage or insult or wanton interference with rights, any act, in short, which showed contempt of the personality of the victim or was such as to lower him in the estimation of others."²⁴⁴ Secondly, there had to be an act against the *boni mores*; and furthermore, the culprit must have acted with *animus iniuriandi*.²⁴⁵ Finally, none of the recognised 'justification grounds' had to apply in the circumstances.²⁴⁶ However, like the development of the fault requirement with respect to the liability of the *iudex, qui litem suam fecit* in high-classical law, *animus iniuriandi* may not as yet be interpreted as intention or fault in its modern, exclusively subjective, sense.²⁴⁷ Rather, the high-classical notion of *animus iniuriandi* once again appears as a stepping stone in the development towards Justinian's

²⁴² Walter, *Actio Iniuriarum*, 44-50; Zimmermann, *Law of Obligations*, 1052-1059; Burchell, *Law of Defamation*, 4-5; Ranchod, *Foundations*, 8; Pauw, *Persoonlijkheidskrenking*, 11; McQuoid-Mason, *Law of Privacy*, 19; Liebs, *RR*, 289-293; Kaser, *RPL*, 257.

²⁴³ Walter, *Actio Iniuriarum*, 51.

²⁴⁴ Buckland and Stein, *Text-Book*, 590.

²⁴⁵ However, the term *animus iniuriandi* was hardly employed and was introduced by the Glossators and Commentators only some centuries later. Rather, the sources refer to *animus iniuriae faciendae* (Paul D.47.10.26) or to *iniuriae faciendae causa* (Iav. D.47.10.44). See Walter, *Actio Iniuriarum*, 53 fn56.

²⁴⁶ Walter, *Actio Iniuriarum*, 50-57; Zimmermann, *Law of Obligations*, 1059-1062; Burchell, *Law of Defamation*, 5-7; Ranchod, *Foundations*, 11; Midgley, *Delict*, 9-10.

²⁴⁷ Contra de Villiers, *LQR* 34 (1918), 412 fnn228 and 229.

(final) system of legal liability based on subjective criteria. This intermediate step resembled more the notion of ‘typical culpa’ or a casuistic approach.²⁴⁸

It is under the rubric of justification grounds, however, that the possible liability of the *iudex* under the *actio iniuriarum* needs to be discussed. Imagine the case of a Roman *iudex* who defamed a litigant in court, fulfilling all the requirements for liability, including *animus*. Could this judge raise any of the Roman justification grounds in an action against him?

High-classical Roman law accepted a number of grounds for denying an *actio iniuriarum* even though all other requirements were met. From a modern point of view, these grounds would relate either to defences against wrongfulness or defences against fault. What is material at this stage, however, is that classical Roman lawyers never drew this distinction.²⁴⁹ Even though wrongfulness (in the broadest possible sense of *iniuria*) initially contained the notion of *culpa* (fault), and thus never ceased to lurk in the background when *culpa* became the essential element in the determination of legal (delictual) liability in Roman law, it took almost another 2000 years before wrongfulness and fault emerged as distinct concepts in South African private law necessitating a distinction between defences.²⁵⁰

In high-classical Roman law, the *actio iniuriarum* did not lie against mentally disabled persons and minors; nor in cases of consent, truth or jest; nor in cases involving acts of authority (eg. chastising of pupils or children). The *actio* furthermore was not applicable in cases where a person acted in exercise of public office. This person, consequently, was presumed to have acted lawfully.²⁵¹ Such privileged status appears principally from two sources: “*Quae iure potestatis a magistratu fiunt, ad iniuriarum actionem non pertinent*”²⁵²,

²⁴⁸ Zimmermann, *Law of Obligations*, 1061 makes the point: “Objective and subjective ingredients were inextricably interwoven within the concept of *iniuria*, and the relative weight attached to each depended, furthermore, on the type of injury in question.” Ranchod, *Foundations*, 15, states that “...conduct which was classified as *injuria* usually did not occur without some form of *dolus*.”; Pauw, *Persoonlikheidskrenking*, 26; Walter, *Actio Iniuriarum*, 52-54, are sceptical about Ranchod’s emphasis on *dolus* (*malus*). With regard to ‘typical culpa’ see also the text above at fn144 *et seqq* and the authorities quoted there.

²⁴⁹ Ranchod, *Foundations*, 17; Walter, *Actio Iniuriarum*, 54.

²⁵⁰ See below at chapter VII 2 1.

²⁵¹ Note, however, that Roman law did not operate with a concept of ‘presumption of *animus*’ or ‘presumption of *dolus*’, which, for reasons that cannot be explained here, appeared only in the age of the Glossators and Commentators. For details see below at chapter IV 2.

²⁵² D 47.10.13.6.

and more generally, from the following: “*Is, qui iure publico utitur, non videtur iniuriae faciendae causa hoc facere; iuris enim executio non habet iniuriam.*”²⁵³ What is referred to here is evidently the exemption of public officers, or more precisely, of the magistrate, from delictual liability. The essential argument is that a magistrate’s exercise of a public right could not cause *iniuria*.

In addition to the above-mentioned passages, we know of a number of other examples where Roman jurists engaged in discussion of the liability of magistrates for damage caused in the exercise of their official functions.²⁵⁴ If reference was not to the *actio iniuriarum*, it was to the *actio legis Aquiliae* or to *actiones in factum*.²⁵⁵ In each of these cases, the magistrate did not easily attract liability. On the other hand, this privilege did not go the full way, so to speak, as absolute privilege from liability. Already, the Roman jurists albeit not very successfully, were determined to fix the boundaries of the magistrates’ authority. They offered no clear criteria for determining precisely when a judge would be held liable. And, as shall be shown, these uncertainties were not resolved by later generations of jurists. From the available sources it seems that liability arose only where the magistrate exceeded the confines of his authority, where he acted *non iure*, that is without a right or undutiful.²⁵⁶ This principle apparently applied also to the *actio iniuriarum* as appears from the following passage:

“*Quod rei publicae venerandae causa secundum bonos mores fit, etiamsi ad countumeliam alicuius pertinet, quia tamen non ea mente magistratus facit, ut iniuriam faciat, sed ad vindictam maiestatis publicae respiciat, actione iniuriarum non tenetur.*”²⁵⁷

However, it must be noted that this justification ground of public office, as it may be called, did not apply to Roman judges for the simple reason that the *iudex* under the formulary system exercised an honorary duty (*munus publicum*) but he did not hold a public office, nor did he exert any *imperium*.²⁵⁸ It was only in the person of the *praetor*, during the proceedings *in iure*, that the parties faced a member of the magistracy. The Roman lay *iudices* thus did not enjoy

²⁵³ D 47.10.13.1.

²⁵⁴ D 9.2.29.7; D 18.6.14; D 47.8.2.20; D 43.24.7.4.

²⁵⁵ Generally see Zimmermann, *Law of Obligations*, 1003; Borkowsky, *Textbook*, 106-107. See Kunkel and Wittmann, *Staatsordnung*, 259-260 with regard to procedural aspects of civil actions against magistrates. For details see below at 4.

²⁵⁶ Julian D.18.6.14.

²⁵⁷ Paul D 47.10.33.

²⁵⁸ Kaser and Hackl, *ZPR*, 359: “Bei alldem steht ihm [the *iudex*] als Privatmann keinerlei amtliche Befehls- oder Strafgewalt zu.” See also Kübler, *ZSS (RA)* 39 (1918), 213. With respect to the *iudices*’ *munus publicum* see again above at fn51.

the privileged status of members of the magistracy with regard to liability for infringement of personality rights under the *actio iniuriarum*.

With the introduction of the proceedings *extra ordinem cognitio*, however, judges came to operate as full members of the imperial bureaucracy.²⁵⁹ Only from this stage of the development did the rules relevant to the Republican or early classical magistrates apply to all Roman *iudices*: they were exempt from an action as long as they had not acted *non iure*.

In Justinian Roman law generally, *iniuria* was incorporated in the *Corpus Iuris Civilis* without any substantial modifications of its classical form.²⁶⁰ The title of the *Digest* (D 47.10 *de iniuriis et famosis libellis*) relied extensively on Ulpian's commentary on the edict, and the relevant title of the *Institutiones* (Inst. 4.4 *de iniuriis*) was based upon Gaius's textbook.²⁶¹ A number of interests were emphasised and came under the wings of the *actio iniuriarum*, namely *corpus*, *dignitas* and *fama*. In line with what has been said above in discussion of the scope of the liability of the *iudex* at the time of Justinian, fault (*animus iniuriandi*) also became the essence of the Justinian *actio iniuriarum*.²⁶² No indication whatsoever appears from the sources that under Justinian regulations other than that stated above applied to the question of judicial liability under the *actio iniuriarum*.

With regard to the assessment of the damages a late Roman *iudex* had to pay, the general standards of the *actio* may be taken as a basis. Hence, the *actio iniuriarum* was directed at payment of a sum of money which had to be specified by the plaintiff. The court then granted a certain sum according to equitable discretion (*quantam pecuniam...bonum aequum*

²⁵⁹ As pointed out earlier, due to a reversal of terminology, it was now the term *iudex* that covered any official endowed with jurisdictional as well as administrative authority (including the successors of the 'old' magistracy). See Kaser and Hackl, *ZPR*, 519-520. At 529 they state: "Die allgemeine Gattungsbezeichnung für alle Arten von Richtern ist *iudex*...Da die hauptamtlichen Richter auch verwaltende Aufgaben erfüllen, heißen sie ferner *administrantes*, *administratores*...bisweilen nach wievor *magistratus*. Die Amtstätigkeit wird bald mit *iurisdictio*, *iudicium* bezeichnet, bald mit *administratio*." See also the text above at fn 88.

²⁶⁰ Burchell, *Law of Defamation*, 8; Walter, *Actio Iniuriarum*, 59; McQuoid-Mason, *Law of Privacy*, 26; Kaser, *RPR II*, 439.

²⁶¹ Walter, *Actio Iniuriarum*, 59.

²⁶² Ranchod, *Foundations*, 21; Burchell, *Law of Defamation*, 8.

videbitur). Furthermore, condemnation rendered the judge *infamis*, which was tantamount to his removal from office.²⁶³

4 PROCEDURAL ASPECTS AND THEIR PRACTICAL IMPLICATIONS

Finally, there arises the question of particular procedural restrictions or regulations for actions against Roman *iudices*.

First, with regard to the relevant action, it has been indicated elsewhere that under the edict it was an *actio in factum* under which a judge had to be sued. For post-classical law, it may be assumed that, in cases of *dolus*, the *actio legis Aquiliae* was the proper action, and an *actio in factum* was appropriate in instances of *imprudentia* misjudgements which had caused loss to a party. In cases of *iniuria* by a judge, the *actio iniuriarum* applied. Generally, under the formulary form of procedure all alike were subject to summons to court. Even at later periods, there was, at least in theory, some justification for the claim that the law was the same for all. In practice, however, there were certain important exceptions to this general rule.²⁶⁴

In the *Digest* at 2.4 under the title *de in ius vocando* (of summons), we are informed of two of these:²⁶⁵ certain persons were not to be summoned into court at all; others could be summoned only with the permission of the *praetor*. Magistrates, who held *imperium* (at the time of the Republic for one year²⁶⁶) could not be summoned into court. This rule obviously included the *praetor*. Reference must also be made to the *iudex* in this respect. While a judge was occupied

²⁶³ Kaser, *ZSS (RA)* 73 (1956), 262 and 264.

²⁶⁴ Jones, *Later Roman Empire*, 518.

²⁶⁵ Even though we have information only on the following aspects from the jurists of the high-classical and early post-classical period, it has been suggested that this was based upon old traditions. See generally Weinrib, *Phoenix* 22 (1968), 32-56; Kunkel and Wittmann, *Staatsordnung*, 259-260 and 265-267 for civil actions against magistrates.

²⁶⁶ Weinrib, *Phoenix* 22 (1968), 33 observes: "The immunity from magistrates with *imperium* from the accusations of private citizens was deeply rooted in the structure of Roman political life. As long as the supreme magistrates exercised in their own persons all the judicial functions in the state, i.e., until the institution of the praetorship in 367 B.C., there was simply no possible procedure for a citizen to follow in prosecuting a holder of *imperium*... This immunity from liability in private suits was not regulated by any rules of its own but solely by the powers inherent in each given office. Thus consuls and praetors were immune because of their *imperium*...". And further at 34.

with the hearing of a case as well as preparing and giving a judgement, he could not be called upon to appear in an action against himself.²⁶⁷

Undoubtedly, this concept operated as a procedural privilege. It appears to have been based on practical considerations rather than to protect the judges from personal harassment or from loss of status. It is evident that one objective behind such privilege was to enable the defendant to perform (or rather to conclude) his occupation or vocation. A magistrate was to be sued only after the ending of his term, a *pontifex* at the end of his office (*dum sacra facit*). Similarly, a person who was riding on a state horse while on some public mission, a couple who were about to get married or anyone who was involved in a lawsuit before the *praetor* or before another court could not be cited while occupied with these activities. The same (practical) principle applied to the *iudex*. Thus, only after a judge had given judgement in a pending case and his official duty had been terminated, could he be sued in an action. In light of the requirements of the formulary system of procedure, this regulation was perfectly sound; complete procedural privilege, if it had existed, would have rendered illusory the (sole) remedy granted by means of an action against the *iudex*, *qui litem suam fecit*.

The impression gained from *D* 2.4 is confirmed by a passage in *D* 47.10.32, which was touched upon earlier in discussion of the liability of judges/magistrates under the *actio iniuriarum*. This section states that a plaintiff had to wait until the end of the magistrate's term in order to sue him in court. This rule applied to actions committed either in an official or in a private capacity. The only exception was with regard to minor magistrates, who did not hold *imperium* or *potestas*. These officials could be sued immediately, while still in office.²⁶⁸ *E contrario* it appears that during the Republic and for most of the Principate they include *iudices*, who due to their lack of general *imperium* were comparable to minor magistrates.

To the second group of persons referred to above, who could not be summoned without leave from the *praetor* there belonged, for instance, the plaintiff's forbears and the patron (and his ancestors or descendants) of a freedman. In such cases, the prospective plaintiff had to petition

²⁶⁷ *D* 2.4.2: "Praeterea in ius vocari non debet qui uxorem ducat aut eam quae nubat: nec iudicem dum de re cognoscat..."

²⁶⁸ "Si quid igitur per iniuriam fecerit magistratus vel quasi privatus vel fiducia magistratus, iniuriarum potest conveniri. Sed utrum posito magistratu an vero et quamdiu est in magistratu? Sed verius est, si is magistratus est, qui sine fraude in ius vocari non potest, expectandum esse, quoad magistratu abeat. Quod et si ex minoribus magistratibus erit, id est qui sine imperio aut potestate sunt magistratus, et in ipso magistratu posse eos conveniri."

for a so-called *venia agendi*.²⁶⁹ This second category reveals an added reason for procedural privilege, which applies also to the summoning of magistrates: It was felt that, like the summoning of parents or patrons before the *praetor*, the summoning of magistrates amounted to a serious derogation of their (public) authority.²⁷⁰

Consequently, it appears that in classical law judges generally could be summoned without greater procedural obstacles. Whether or not the same principles applied at the time of the Principate or the Dominate is not easy to answer. The relevant passages are included in Justinian's *Digest* and initially derived from Ulpian's commentary on the edict. Naturally, the compilers had no reason to include a regulation that did not apply in their day. On the other hand we know by now that the whole context, namely the procedures for summons, had changed considerably since the introduction of the extraordinary forms of procedure.

Regrettably, there are no other passages that refer in more detail to the post-classical state of law. The only information we have in this respect derives from the fact that imperial officers were subject not to the ordinary courts of their district but enjoyed privileged jurisdiction. In civil or criminal proceedings initiated by or against officers of the imperial court, this jurisdiction was exercised by the *magister officiorum*.²⁷¹ Provincial governors had to be sued before the court of the responsible *praefecti praetorio* or the *vicari*. In any case, the emperor had to be informed of a pending case.²⁷² Taking into account the deterioration within the sphere of the post-classical administration, it is obvious that in practical terms this system of privileged jurisdiction carried considerable risk of abuse. It is likely that, *esprit de corps*, selfishness and protectionism made it almost impossible to initiate an action against an imperial judge, quite apart from the unlikelihood of winning such a case.²⁷³

Despite the inconclusiveness of the answers to the questions posed here, it is not superfluous to consider these aspects. In particular, the concept of praetorian leave to summon offers a starting-point for subsequent developments, for instance in (South African) Roman-Dutch

²⁶⁹ D 2.4.4.1-3. See also Jones, *Later Roman Empire*, 518-519.

²⁷⁰ Theme stressed by Weinrib, *Phoenix* 22 (1968), 35 with respect to magistrates.

²⁷¹ Thür and Pieler, *Gerichtsbarkeit*, 451; Kaser and Hackl, *ZPR*, 544.

²⁷² C 1.26.4. See Thür and Pieler, *Gerichtsbarkeit*, 452; Kaser and Hackl, *ZPR*, 535 fn30.

²⁷³ Thür and Pieler, *Gerichtsbarkeit*, 450.

law. The same applies to the underlying idea of procedural protection of superior administrative or judicial officers.²⁷⁴

5 OTHER FORMS OF JUDICIAL ACCOUNTABILITY

In addition to civil liability, brief reference should be made here to criminal liability as a second and alternate means of judicial accountability.²⁷⁵ Criminal liability historically derives from the so-called *leges*, which during the days of the Republic were promulgated by the *comitia*, initially the assembly of the Roman people. Except for early Roman law under the XII Tables, criminal liability of judges was always separated from civil liability.²⁷⁶

Two main *leges* must be mentioned: the *lex Cornelia de sicariis* and the *lex Julia de repetundis*. According to the *lex Cornelia*, in capital (criminal) cases a magistrate or a *iudex questionis* who conspired or accepted a bribe faced the death penalty. In practice, however, the death penalty was replaced by exile. The regulations of the *lex Julia* imposed a fine and *infamia* on those judges who accepted a bribe in either civil or criminal cases. Liability under the *leges* was subject to some extensions in late classical law. Under the *lex Cornelia*, punishment for corruption on the part of a judge may now have applied not only to capital cases but also to others less serious. The customary penalty was exile and confiscation of property. The *lex Julia*, too, was extended. It applied to improper judgements motivated by reasons other than corruption, for instance anger or hatred. Under a third *lex*, the *lex Cornelia Testamentaria*, imperial judges were sentenced to confiscation of property, deportation and loss of citizenship if they disobeyed an imperial statute or deliberately refused to apply a rule of the *ius publicum*.²⁷⁷

The relation between judges' civil and criminal liability in Roman law may be summed up in the words of Geoffrey MacCormack:

²⁷⁴ See below at chapter VII 4.

²⁷⁵ Generally see MacCormack, *Liability of the Judge*, 4-5, 6-9 and 10-16.

²⁷⁶ See above at 2 1.

²⁷⁷ See MacCormack, *Liability of the Judge*, 25-27.

“...there can in the Republic and early Principate have been little overlap between the edict and the *leges*. The former was confined to judges sitting in civil cases and imposed liability for failure to observe the basic procedural requirements of the judicial office...The *leges* were concerned primarily with judges sitting in criminal courts and imposed penalties for various kinds of judicial misconduct including the acceptance of bribes.”

A judge who was bribed to give a (procedurally) wrong judgement may have been liable under both the edict and one of the *leges*. In this event, the actions may have run concurrently. It is evident, however, that in Roman law civil and criminal liability practically never fell together in one action. As we will see in the following chapter, this aspect provides an important distinction in the development of the concept of judicial liability in early medieval law.

"Kings and princes are chosen among nations so that, by fear of them, they may restrain their people from evil, and constrain them by laws to a good life. If all men were free of fear, who would be able to keep anyone from wickedness?"

(St Isidore of Seville¹)

III EARLY MEDIEVAL LAW

1 INTRODUCTION

From the reign of Emperor Constantine at the beginning of the fourth century A.D., Roman law was increasingly subject to a process of vulgarisation. This general tendency came to a halt in Byzantium during the sixth century. The counter-movement peaked, as was discussed earlier, in the Justinian classicism embodied in the famous *Corpus Iuris Civilis*. In the western part of the empire, however, such renaissance did not take place before the eleventh century.

By the beginning of the sixth century, the Roman empire had been divided into three main groups of civilisations: the Graeco-Christian Byzantine empire; the Arab-Islamic world and the Latin-Christian West.² From 476 A.D. the latter, in its entirety, fell under the control of the now sovereign Germanic kings. Already under Roman rule, Visigoths, as so-called *foederati* (allied mercenaries), had settled in what is today southern France, Spain and Portugal; Ostrogoths moved into the Italian peninsula and the western parts of the Balkans; Burgundians settled around Lyon in Burgundy; and various tribes of the Franks (Salic and Ribuarian) found themselves in northern France, in Belgium, the Netherlands and the western parts of Germany along the Rhine river north of Mayence.³

¹ Quoted in Kelly, *Western Legal Theory*, 109.

² Van Caenegem, *Historical Introduction*, 16.

³ See Vinogradoff, *Roman Law in Medieval Europe*, 4-5; Kelly, *Western Legal History*, 84-88; Goffart, *Techniques*, 103-127 (Visigoths), 127-162 (Burgundians) and 176-206 (Lombardians); King, *Visigothic Kingdom*, 1-6 and 13-19; Hattenhauer, *ERG*, 89-91; De Vos, *Regsgeschiedenis*, 28-36; Van Zyl, *Geschiedenis*, 43-45; Hahlo and Kahn, *Legal System*, 358-360.

The history of the centuries between 500 and 800 is full of paradoxes. The process of settlement of the barbarian tribes in the west was characterised by plundering and massacres on the one hand and, on the other, by the assimilation of the victors, who, to a large extent, accepted Roman institutions and Roman customs. The new forms of government reflected both the political and military impotence of the Romanic population and their active co-operation with the Barbarians. It was a truly revolutionary situation.⁴ The obvious cultural descent in these Germanic kingdoms from the level attained in the age of antiquity no doubt affected the legal sphere also.

A number of codifications by the early medieval kings have come down to us, and are good evidence of the process of vulgarisation of private law. Vulgarisation may be understood as, essentially, a simplification of abstract classical thinking in its substantial and methodical perfection.⁵ The vulgarisation that originated in the post-Diocletian Roman period was even more drastic in the successive Germanic kingdoms. Moreover, Germanic legal concepts increasingly became mixed in.⁶ In this regard, one might refer, for instance, to the diminishing

⁴ Seston, *Verfall des Römischen Reiches*, 603. This might be further exemplified by the following numbers. The Romanic population of Spain in the fourth century A.D. has been estimated at about 9 million. The invading Visigoths were estimated merely at about 200 000. It was for military reasons that Roman emperors, bishops, generals or administrative officers gave way to the Barbarian intruders. In light of the outnumbering of Barbarians by the Roman population it is clear that the end of the (West) Roman Empire was not the death of the idea of a Roman Empire and even less so the death of Roman civilisation in most of its former provinces. See also Kelly, *Western Legal Theory*, 92-95.

⁵ For the history of the term Roman vulgar law see Levy, *West Roman Vulgar Law*, 2 and the critical work by Kop, *Vulgaire Romeins Recht*, 23-70. Kop argues that the term vulgar law was introduced mainly by the positivistically inclined German scholars of the second half of the nineteenth century, who identified with the Roman classical jurists and consequently felt obliged to separate apparently inferior emanations outright from the truly classical sources. Post-classical Romans certainly never drew a distinction between classical and vulgar law as Mayer-Maly states convincingly in *Römisches Vulgarrecht*, 1135. Levy in his *Vulgarrecht* states at 2 that vulgar law circumscribes all those definitions and rules of the law in effect that deviated from the rules of the high classical system without deriving from imperial enactments. Vulgar law grew without control, based merely upon the necessities and realities of post-classical everyday (legal) life. It was formulated in a more or less skilful manner by the jurists of this age. Levy also stresses that the social climate in general had changed considerably since the high classical age: what had been the heart of the high classical system, namely individualism as well as the free initiative of each member of society, was replaced by the efficiency of an autocratic state, an economic revolution, an upheaval of social hierarchies, the vanishing of the formulation of procedures. Beyond doubt, substantive law yielded to this onslaught. Further see Kaser, *RPL*, 7; Van Zyl, *Geschiedenis*, 53-55 particularly fn20; De Vos, *Regsgeschiedenis*, 41-44; Hahlo and Kahn, *Legal System*, 371-376; Köbler, *Bilder*, 31.

⁶ Levy, *West Roman Vulgar Law*, 1 and 10: "With his reign [Emperor Constantine] commences that section of Roman legal history which characterises the intervening period. This period lasted well into the sixth century. In the West, in particular, the vulgar law maintains itself much beyond the age of Justinian. As late as the eighth century, the Frankish collections of

of a proper theory of causation or fault. Already in the West, under Roman law, various meanings had become attached to *culpa*. As we have shown earlier, it indicated unjustified as well as culpable acts or even omissions. Occasionally, it was also used to describe delicts in general. However, the worked out meaning of negligence developed later in Byzantium under Justinian was clearly never achieved.⁷ At a later stage, particularly in the more Germanic influenced *leges*, the strong tendency to return to the more simplistic system of objective or strict liability prevailed.⁸

Two groups of these *leges* must be distinguished.⁹ The *Edictum Theodorici* was legislated at an early stage of development (between 453-467 A.D.), and is considered to have been one of the last Roman edicts enacted in the name of the Emperor Maiorian by a provincial governor (the *praefectus praetorio Galliarum* Magnus of Narbo) for the Visigoths under their King Theuderic II.¹⁰ Early in the fifth century A.D., the now sovereign Burgundian king Gundobad and the Visigoth Alaric II, with the assistance of Roman jurists, enacted a collection of various Roman legal texts for the Roman population of their kingdoms, the so-called *lex Romana Burgundionum* and *lex Romana Visigothorum* (*Breviarium Alarici*), respectively.¹¹

formulae and the *lex Romana Curiensis* furnish striking proof of its continuing efficacy and strength. But Germanic ideas appear more and more frequently, particularly in the Burgundian, Lombard, and Frankish kingdoms. Correspondingly, the pure vulgar law loses ground, though a definite time limit cannot be set." Vinogradoff, *Roman Law in Medieval Europe*, 11 describes this process as follows: "Thus the output of the older juriconsults...went overboard at the time of the Visigothic codification, as too learned and too complicated for the age."

⁷ See Levy, *Vulgarrecht*, 99: "*Das Vulgarrecht des Westens reichte nicht in solche Tiefen. Die begrifflichen Gegensätze wurden mehr verwischt als geklärt. Culpa...bezeichnete bald ein rechtswidriges, bald ein schuldhaftes Tun oder Unterlassen. Bisweilen stand es einfach für delictum.*" For the development under Justinian see again above at chapter II 2 3 1 2.

⁸ Schmidt-Speicher, *Rechtsbeugung*, 18: "...die das germanische Recht beherrschende Erfolgshaftung..."; Hahlo and Kahn, *Legal System*, 353: "In meting out punishment, the *ding* considered only the effect of the deed. Subjective culpability...was not taken into account. It made no difference whether the harm had been done intentionally, negligently or accidentally."

⁹ For the following see Vinogradoff, *Roman Law in Medieval Europe*, 6-31. More recently see Wormald, *Germanic Kingship*, 105-138; Collins, *Early Medieval Spain*, 24-31; King, *Visigothic Kingdom*, 6-11; James, *Origins of France*, 81-91; Van Caenegem, *Historical Introduction*, 16-29 with bibliography; Van Zyl, *Geskiedenis*, 55-63 and *Roman Private Law*, 56-60; De Vos, *Regsgeschiedenis*, 42-44; Hahlo and Kahn, *Legal System*, 372-377; Kunkel, *RG*, 135-136; Kroeschell, *Rechtsgeschichte*, 30-33 with useful references and bibliography, see further 53-56 and 70-71.

¹⁰ Van Zyl, *Geskiedenis*, 55 and *Roman Private Law*, 58; Kunkel, *RG*, 143; Hattenhauer, *ERG*, 90-91.

¹¹ The *lex Romana Visigothorum* for instance included an abbreviated version of the *Codex Theodosianus*, an abstract of Gaius's *Institutes*, the *Epitomae Gai*, an excerpt from the *Sententiae Pauli*, as well as some constitutions from the post-classical *Codices Gregorianus* and *Hermogenianus* and the *Novellae Post-Theodosianae*. All except the excerpts from Gaius's work have been commented on in a so-called *Interpretatio*. See Vinogradoff, *Roman Law in Medieval Europe*, 9-13 for a helpful overview. The *lex Romana Burgundionum* was based on similar material, although the component parts

These *leges* may still be identified as belonging to Roman vulgar law in the narrow sense since they drew essentially upon Roman law.¹² It is noteworthy that, for instance, the *lex Romana Visigothorum* remained the basic codification in Spain and southern France well into the high Middle Ages. Only from the thirteenth century, was it replaced by the incorporated and adapted *Corpus Iuris Civilis*.¹³

Parallel to the enactment of the *lex Romana Burgundionum*, King Gundobad legislated the so-called *lex Burgundionum* for the Germanic population of Burgundy.¹⁴ From the early sixth century, the Germanic Kings increasingly enacted *leges* of this second kind, which contained more Germanic than Romanic legal concepts.¹⁵ There were, for instance, the Frankian *lex Salica* (about 500) and the *lex Ribuaria* (about 620 A.D.) or the Visigothian *lex Visigothorum* (about 650 A.D.). It appears that all these enactments were strongly influenced by the *Codex Euricianus* (about 475 A.D.), an enactment of the Visigothian King Euric.¹⁶ An important role was played by the *Edictum Rotharis* (643 A.D), the law of the Lombards.¹⁷ From 568 A.D. to about 650 A.D, the Lombards, a Germanic tribe originally from the middle section of the

were not presented separately as in the Visigothian *lex*, but were incorporated in one text. For more details as to the *leges Romanae* see Van Zyl, *Roman Private Law*, 58-59 and *Geskiedenis*, 55-58; Hahlo and Kahn, *Legal System*, 372-373; Kunkel, *RG*, 144-145; Collins, *Early Medieval Spain*, 27-29.

¹² There is ongoing discussion of the characteristics of the early medieval codifications, whether only the *leges Romanae* or also the supposedly more Germanic *leges nationum Germanicarum* were based on Roman vulgar law. See Collins, *Early Medieval Spain*, 26-30 and Van Zyl, *Geskiedenis*, 51-52 for an overview.

¹³ Vinogradoff, *Roman Law in Medieval Europe*, 7; Van Caenegem, *Historical Introduction*, 17 fn1, Hattenhauer, *ERG*, 92: "Die für das abendländische Recht wichtigste Leistung vollbrachten die Westgoten. Man kann getrost von ihnen sagen, daß sie das römische Recht über Jahrhunderte des Frühmittelalters hinweg gerettet haben."

¹⁴ This duality of enactments is a manifestation of the so-called principle of personality, which means that Germanics and Romans each continued to live and had to be tried in accordance with their own laws. See also Kaser, *RPL*, 7; Van Zyl, *Geskiedenis*, 52-53 and *Roman Private Law*, 57; Vinogradoff, *Roman Law in Medieval Europe*, 15-18; Van Caenegem, *Historical Introduction*, 19.

¹⁵ Schmitt-Weigand, *Rechtspflegedelikte*, 67 observes: "Von allen germanischen Rechtsaufzeichnungen ist die *lex Visigothorum* am stärksten vom römischen Recht beeinflusst worden; mit Recht kann man von einer weitgehenden Zurückdrängung des germanischen Elements in diesem Gesetzbuch sprechen."

¹⁶ He was the brother of the above-mentioned Theuderic II and father of Alaric II who legislated the *lex Romana Visigothorum*. See Collins, *Early Medieval Spain*, 25-29; Van Zyl, *Geskiedenis*, 56 fn21 and *Roman Private Law*, 58 fn167; Kunkel, *RG*, 144.

¹⁷ The Lombards were probably the legally most advanced Germanic tribe and developed a relatively high standard of administration of justice. It is little wonder therefore that the first law school was erected in the eighth century at Pavia, the capital of the Lombardian kingdom, from where the revival of a legal science swept over to Bologna and from there to the rest of medieval Europe. See Siems, *Bestechliche und Ungerechte Richter*, 563; Stein, *Römisches Recht und Europa*, 79-80; Hahlo and Kahn, *Legal System*, 487-488; Vinogradoff, *Roman Law in Medieval Europe*, 39-40.

Danube River, controlled the deserted marshes of the River Po in northern Italy, which they conquered from the weakened Byzantians who, under Justinian's generals Belisar and Narses, had defeated the Ostrogoths some decades earlier.¹⁸ In later centuries, there appeared the *lex Alamannorum* (about 729 A.D.), the *lex Baiuvariorum* (about 740 A.D.), the *lex Saxonum* and the *lex Frisionum* (around 800 A.D., in parts of what is today the Netherlands).¹⁹

2 THE POSITION AND STATUS OF JUDGES WITHIN THE EARLY MEDIEVAL ADMINISTRATION OF JUSTICE

It is beyond the scope of this work to provide a detailed picture of the superstructure of the administration of justice and of the role, functioning and staffing of the courts of all the early medieval kingdoms that spread on the domain of the former Roman Empire. To this day, many of the related aspects of this 'dark age' are subject to speculation and scholarly controversy. Moreover, the various Germanic kingdoms hardly followed a uniform pattern. On the contrary, we have to deal with a variety of solutions and, further, with a period that lasted for some 600 years, leaving room for diverse developments. Nevertheless, for a better understanding, it is essential to sketch at least the most important lines of development.

Two basic concepts appear to have dominated the administration of justice of the early Middle Ages. The courts sat either with a single judge who, as in the post-classical legal system conducted the hearing and gave judgement *in persona*; or adjudication was provided for in a bipartite system whereby judges and so-called 'law-speakers' were involved in the process of adjudication.²⁰ Under the latter system, the judge was limited to presiding on the bench and to

¹⁸ See De Vos, *Regsgeskiedenis*, 30-32. As mentioned earlier, the Byzantine Empire retained control of the area around Ravenna, Rome (seat of the Pope) as well as Istria, Naples and parts of Calabria. The separation of Italy into a Byzantine (later Papal) and a Lombardian (later Frankian) section was decisive in the Italian (legal) history of the following seven centuries. See especially below chapter IV 1.

¹⁹ Van Zyl, *Geskiedenis*, 60-61; Hahlo and Kahn, *Legal System*, 376-377; De Vos, *Regsgeskiedenis*, 142-143.

²⁰ Dawson, *Lay Judges*, 37; Weitzel, *Gerichtsverfahren*, 1333: "Das Mittelalter kannte zwei Grundmodelle des Gerichtsverfahrens...Zum einen lebte der (spät-) römische Prozeß fort, in dem ein oder mehrere (Beamten-) Richter zugleich vorsäßen und urteilten...Das Modell wurde von den Westgoten, Burgundern und Langobarden übernommen...Zum anderen bildete sich ein fränkisch-deutsches Gerichtsverfahren aus...Vorsitz, Prozeßleitung und Urteilsvollzug kamen dem

exercising the courts' authority. The judgement as such was proposed by the law-speakers, who were laymen with some legal knowledge. The judge declared the judgement to the parties to the lawsuit only after the 'bystanders', the assembled community of local people, had stated their approval or disapproval of the proposed verdict.²¹ Scholars have considered bipartition a typically Germanic concept that came to be fused with vulgarised Roman concepts only by retention. Not surprisingly, therefore, we can trace the influence of bipartition predominantly in those areas of post-Roman Europe which were only slightly subject to Roman legal influence, namely the northern and eastern part of the Frankish empire; whereas in Italy, southern Gaul and Spain, the single judge remained a common feature.²²

Furthermore, it is important to note that the post-classical Roman hierarchy of courts with its flawless appellate system, including appeals to the responsible governors, *vicarii*, *praefecti* or even to the court of the emperors, disappeared and was replaced by a vast number of local jurisdictions, in fact one court for each county. These county courts (so-called *mallus*, *conventus*) in principle were based on the ancient Germanic *ding*.

In the Visigothian kingdom, an undivided system of administration of justice, based upon the relatively strong Roman influences that continued to prevail, covered both groups of the population, Visigoths as well as former Roman citizens. As inferior judges adjudicated a *vicarius comitis* or a *iudex territorii*, commonly referred to as *iudices locorum*. These judges were appointed by the king and controlled by a count (*comes*) as well as by a duke (*dux*). The judges generally sat as single judges, and any contribution from other members of the local community was strictly prohibited. The local judges had to decide the law on the basis of the Visigothian *leges*. The highest court was the court of the king, who decided all questions of law that had not as yet been settled by the *leges*.²³

The Burgundian *leges* do not contain precise details of the system of adjudication. Most likely, justice was administered on the local level by two judges, a Burgundian and a Roman count (*comes* or *iudices deputati*). The royal court apparently had jurisdiction for all suits that

Richter zu, während das Urteil bei der Gerichtsgemeinde bzw. ihren Repräsentanten, den Urteilern, lag." Further note Drüppel, *Richter*, 833-834.

²¹ Dawson, *Lay Judges*, 37; Weitzel, *Gerichtsverfahren*, 1334; Köbler, *Bilder*, 76-79.

²² Weitzel, *Gerichtsverfahren*, 1333; Drüppel, *Richter*, 833.

²³ Schmitt-Weigand, *Rechtspflegedelikte*, 67-68; Padoa Schioppa, *Ricerche Sull' Appello*, vol.I 112-116.

could not be settled by application of the *leges*, as well as for instances of denial of justice and wrongful judgements.²⁴

Quite distinct from the situation in Burgundy and in the Visigothian empire, was the administration of justice based upon strong Germanic traditions in Frankia during the reign of the Merovingians. Two distinct courts administered justice. One was the ancient Germanic people's or folk court, the so-called *mallus* or *ding*; the other was the king's court (*curia regis*). The local *mallus* was presided over in the early days by a *thunginus*, a figure of some local power and importance. He was assisted by seven laymen who were supposed to have at least some legal knowledge, the so-called *rachinburgii*. They, too, came from the ranks of the freemen or may have been members of the local gentry.²⁵ Apparently, the *rachinburgii* were selected anew for every trial.

It is much debated whether it was exclusively the *rachinburgii* who decided on the law or whether the *thunginus* or the assembled local community were also involved in the process. The prevailing opinion is that under Frankish law the *thunginus* upheld the court's formal authority, conducted the trial and called on the *rachinburgii* to deliberate on the verdict. It was up to the *rachinburgii* to decide upon the relevant questions of law and to propose a verdict that was in accordance with the norms of the law. The proposal was read to the assembled local community and had to meet with popular acceptance in order to become a valid and binding judgement.²⁶ At the time, the folk court was held in the open air, commonly near a sacred place, under a group of trees, on top of hills or near springs. The *thunginus* generally sat somewhat elevated on a stone and faced the east. Directly before him, on a lower level, sat the *rachinburgii*. Parties to the suit faced the west and appeared directly before the court.

²⁴ Padoa Schioppa, *Ricerche Sull'Appello*, vol.I 127 and 130-132; Schmitt-Weigand, *Rechtspflegedelikte*, 78.

²⁵ James, *Origins of France*, 88; Dawson, *Lay Judges*, 35-37; Van Caenegem, *Historical Introduction*, 25; Hahlo and Kahn, *Legal System*, 395-396; Van Zyl, *Geskiedenis*, 49-51; Nehlsen-von Stryck, *Rachinburgen*, 383; von Olberg, *Rachinbürgen*, 127-130; Geffcken, *lex Salica*, 213, Köbler, *Bilder*, 76-79.

²⁶ For fairly similar proceedings of confirmation of legislation see Kelly, *Western Legal Theory*, 101. Further Hahlo and Kahn, *Legal System*, 354 and 357; Hattenhauer, *ERG*, 38; Dawson, *Lay Judges*, 37-38 fn10 with further references. In a sense this notion of bipartition bears a superficial resemblance to the Roman formulary system of proceedings. Kroeschell, *Rechtsgeschichte*, 44 states: "Erst im frühen Mittelalter aber und sicherlich nicht ohne römischen Einfluß ist den das Urteil sprechenden Rechtskundigen ein Richter vorgesetzt worden, der die Verhandlung eröffnet und leitet und zum Schluß den Spruch verkündet. Hier erst entstand also jene Zweiteilung in Richter und Urteiler, die bis zum Vordringen des gelehrten Rechts das ganze Mittelalter beherrschte...". Note also Köbler, *Bilder*, 78.

Somewhat outside this inner circle stood the rest of the local community, who were obliged to appear on court days.²⁷

As early as the sixth century, it became evident that the local count (*comes, grafio*), a royal servant furnished with administrative, military and fiscal authority, had come to play a pivotal role in the administration of justice in the local districts.²⁸ Initially, in legal matters, the count was solely responsible for the execution of judgements. He was permitted, therefore, to join the court proceedings. Later, these tasks appear to have been delegated to subordinate officials, namely the *centenarius* or the *vicarius*. The counts increasingly concentrated on replacing the traditional *thunginus* on the bench. This development led to an interesting result: the organs of state co-operated with the ancient elements of folk justice. In time, the counts gave some of this newly won judicial authority, mostly in legal matters of less importance, to the *centenarii* or *vicarii*. Serious cases such as murder, physical injury, arson, theft, robbery or inheritance disputes remained under the jurisdiction of the count. This division clearly formed the root of the emerging division into a superior and inferior judiciary.²⁹

The Frankian king's court was, initially, presided over by the king. In due course, however, the major-domo of the palace³⁰ (*maiordomus, Hausmeier*) took the chair during the proceedings. It was only the final judgement that was left to be affirmed by the monarch. Since the king and his household were itinerant, travelling from one palace to another, from villa to monastery to settlement, there was simply no place where the king could be expected to be at a certain time.³¹ Hence, the king's court sat wherever the king was and whenever he decided to hold a court day. The king's court had unrestricted jurisdiction in all legal matters within the empire. In practice, however, this was not possible. Thus, only cases of outlawry, death sentences against members of the nobility or instances of denial of justice or challenge of proposal (*Schelte*) regularly came before the king's court, apart from those cases that were tried owing to the accidental presence of the king in the county. In addition, it was only at the king's court that the so-called judicial duel or trial by battle was conducted, which was

²⁷ Köbler, *Bilder*, 78 and 151-153, Hattenhauer, *ERG*, 35-38.

²⁸ For details on to the structure of the administration of the courts in (Carolingian) Frankia see particularly McKitterick, *Carolingians*, 87-89. Further Hahlo and Kahn, *Legal System*, 395; Dawson, *Lay Judges*, 35-39; Köbler, *Bilder*, 157.

²⁹ James, *Origins of France*, 88; McKitterick, *Carolingians*, 91-92; Drüppel, *Gericht*, 1322-1324; Schmitt-Weigand, *Rechtspflegedelikte*, 6-7.

³⁰ Term used by Fouracre, *Carolingian Justice*, 771.

nothing other than institutionalised combat used as a (quite irrational) mode of proof in resolving a legal dispute.³²

One of the most enduring effects of the reign of Charlemagne, the most influential monarch of the Carolingian successors of the Merovingians, was the reformation of the system of administration of justice. In the people's courts, resort was no longer to the *ad hoc* elected *rachinburgii*, but to *scabini* (lay assessors or doomsmen), commonly members of the local gentry (*meliores homini*) who were appointed as permanent members of the court and consequently provided for greater stability in the administration of justice. Owing to the strengthening of the influence of the *scabini* on the judgement, judges of the Carolingian and later the German Empire (at least at the local courts) were for centuries to remain non-professionals and were restricted to the presidency of their respective courts. Other modifications concerned the people, who were no longer obliged to appear on any court day but only on three fixed court days each year. At these general meetings (*echte Dinge*), serious crimes were tried by the counts in much the same fashion as of old, which meant the inclusion of the people in the final judgement.³³ Ordinary cases were tried as so-called *gebotene Dinge* by the *centenarii* or *vicarii*.

Another modification derived from the introduction of so-called *missi dominici* (royal agents). They supervised the administration of the counts and other officials in the name of the king in their respective counties (*missatica*), which obviously included the supervision of the administration of justice. The *missi* regularly took the chair for the count or the inferior judges when necessary.³⁴ Undoubtedly, the *missi domenici* are a clear indication of the prevailing Carolingian policy of centralisation and uniformity.³⁵

³¹ McKitterick, *Carolingians*, 78; Hahlo and Kahn, *Legal System*, 364 and 396.

³² For details see Bartlett, *Trial by Fire and Water*, 103-126; Köbler, *Bilder*, 79-83.

³³ See Dawson, *Lay Judges*, 38.

³⁴ Fouracre, *Carolingian Justice*, 789.

³⁵ For development from the reign of Charlemagne, see generally Van Caenegem, *Historical Introduction*, 25; James, *Origins of France*, 88; McKitterick, *Carolingians*, 78-79 and 91-93 (administration of justice), 93-97 (*missi domenici*); Fouracre, *Carolingian Justice*, 777 *et seqq* and specifically on the *missi* at 780 *et seqq*; Hahlo and Kahn, *Legal System*, 362-368 and 395-398; Schmitt-Weigand, *Rechtspflegedelikte*, 7 and 26-28; Battenberg, *Schöffen*, 1463-1468; Drüppel, *Gericht*, 1323; Kern, *Gerichtsverfassungsrecht*, 6-7.

Within the Lombardian kingdom, the king was head of the regular and the judicial administration, both within his household and throughout the country. He was the guardian of justice and peace and acted as highest court in judicial matters. On the local level (*civitas*), the kings were represented by the dukes as well as by the *gastalds*. The latter were local representatives of the state particularly in the cities but they were also responsible for the demesne of the state.³⁶ Initially, dukes and *gastalds* frequently coexisted in the same cities or districts. At a later period, they operated not in the same *civitas* but in separate districts which came to be known as *iudicaria*. Both kinds of administrative officers were commonly referred to as *iudices civitatis*, which in itself is evidence of the frequent ambiguity of the term *iudex* in early medieval law.³⁷ In the border districts, another order of judge, the so-called *sculdais*³⁸, seems to have been subordinate to the *iudices civitatis*.

Originally, Lombardian judges, like their Visigothian and Burgundian brethren, adjudicated without the assistance of law-speakers drawn from the local community. Apparently this changed after the Frankish conquest of the Lombard kingdom (773-774), which resulted in an adoption of certain typically Frankian concepts.³⁹ The Lombardian kingdom became an important sub-kingdom (*regna*) of the Frankish empire, administered by Pippin, a son of Charlemagne.⁴⁰ The *duces* were replaced by the Frankish counts. The kingdom was divided into counties, which came to be congruent with the various Italian ecclesiastical dioceses. In addition, the Frankish *missi* supervised, and frequently presided at, the local courts. We also have evidence of the introduction of the *scabini*, an indication that a bipartite system prevailed in Italy from the ninth century onwards.⁴¹ In turn, the *sculdahes* sooner or later disappeared or lost their jurisdiction.

³⁶ Wickham, *Early Medieval Italy*, 51 and 159.

³⁷ Wickham, *Early Medieval Italy*, 39 emphasizes this point when he refers to the central (royal) administration of the state at Pavia: "The *maiordomus*...had public duties, both household and administrative...but also functioned at least partly as royal representatives in the rest of Italy...They heard troublesome court cases in the provinces...The judicial functions make it difficult to disentangle their separate tasks, and the palace officials, like the dukes and *gastalds* in the provinces, are all often called *iudices*."

³⁸ *Ibid.* 41-42.

³⁹ See Schmitt-Weigand, *Rechtspflegedelikte*, 54-55.

⁴⁰ From 774 A.D., the Frankian monarchs carried the title *Rex Francorum et Langobardorum*.

⁴¹ Wickham, *Early Medieval Italy*, 48 and 53; McKitterick, *Carolingians*, 96.

As has been said, a prominent feature of the early system of administration of justice was the ambiguity of the term *iudex*. The courts were presided over by men of some local standing, generally members of the gentry. Frequently these *boni homines* had other, so to say, purely administrative offices thrust upon them. This is particularly evident as regards the counts, who received dues and tolls, levied military forces and supervised the upkeep of roads, bridges or public buildings.⁴² The counts, acting in purely administrative functions, were also referred to as *iudices*. Further, it is obvious that early medieval judicial officers were simply lay judges. They did not receive a professional legal education, and were made eligible for judicial office purely by their social standing. These *boni homines* were expected to show the virtues of the ideal judge: veracity, impartiality, wisdom and incorruptibility. Decisions had to be pleasing to God, since God himself was to judge the judges on the day of the Last Judgement. Clearly, these expectations were based upon Christian influences.

As will be seen, these moral expectations based upon the Christian doctrine of salvation in a sense complemented the disciplinary function of judicial liability. A further means of control emerged in the judicial oath or written declarations. From the days of the Carolingians, the oath of fidelity, which was obligatory for all citizens, was considered insufficient to ensure the proper administration of justice by the judges.⁴³ The Lombardian king Ratchis had already expected from his judges a pledge to hold court personally, to apply the law in a fair and equitable manner and not to accept any gifts. In 829 A.D., an instruction to the Carolingian *missi* advised the removal of incompetent *scabini* and the appointment of new ones after approval by the local community. Thereafter, the new *scabini* had to swear not to propose any deliberate misjudgements.⁴⁴

⁴² McKitterick, *Carolingians*, 88.

⁴³ Generally with regard to the Carolingian oath of fidelity see *ibid.* at 88-89.

⁴⁴ Schmitt-Weigand, *Rechtspflegedelikte*, 99.

3 DEVELOPMENTS IN THE LAW OF DELICT AS A BACKGROUND TO JUDICIAL LIABILITY

The vulgarisation of the law and the closely related decline of scientific knowledge also affected provisions regarding judicial liability. It is generally in the nature of the vulgarised legal material on which some of the *leges barbarorum* were based that no reference whatsoever was made to classical sources of Roman judicial liability, leave alone those passages that appeared only from 530 A.D. in Justinian's *Corpus Iuris Civilis*. Consequently, we need not enquire into the role of judicial liability within the category of quasi-delicts in early medieval law: western Roman vulgar law never accepted the considerably refined category of quasi-delicts.⁴⁵

Furthermore, early medieval law did not separate the criminal, civil and even disciplinary liabilities of judges properly, as had sometimes been the case in Roman law.⁴⁶ The most significant reason for this development, besides the effects of vulgarisation, was the influence of the so-called system of compository fines which prevailed in most of the *leges*. According to this concept, if a court was convinced of the guilt of the accused and did not apply the death penalty, the culprit had to be sentenced to the payment of a fine. The court had no discretion in deciding the amount. It was bound by elaborate tariffs included in the various *leges* which regulated the fines applicable for every single kind of wrongdoing. Two thirds of this sum (*compositio*) was bestowed on the injured party and one third (*fredus*) on the *iudex* involved.⁴⁷ The compository fines operated as remedies to buy peace in the literal meaning of the word. It stood in contrast to the common reaction to an offence, namely the private vengeance of the victim and his clan.

Typically for a comparably unadvanced legal system, the lack of trade and the absence of a market based upon the exchange of money – as well as the fact that society was a conglomerate of clans rather than a territorial state – made it virtually superfluous to develop a refined system of contractual and delictual obligations as forms of civil liability, and to

⁴⁵ Levy, *Vulgarrecht*, 341: "Diese Kategorie [of quasi-delicts] ist dem Vulgarrecht, wie zu erwarten, überhaupt nicht geläufig."

⁴⁶ See above at chapter II 5.

⁴⁷ For the system of compository fines generally, see Hahlo and Kahn, *Legal System*, 351-354; Kroeschell, *Rechtsgeschichte*, 43-45.

separate these from criminal liability. If there was no death penalty, criminal punishment as well as civil compensation culminated in a single monetary fine. This fine was composite in that the impairment of the legal order and the encroachment on the economic interests of the individual had not yet been separated.⁴⁸ Thus, wherever the following passages touch upon fines payable by a judge to an injured party, one should not lose sight of the fact that this fine was not identical with pure civil compensation. Compensation for judicial wrongdoing in early medieval law was, rather, part of a hotchpotch of offences which are regarded separately today as crimes, delicts or even breaches of contract.

It is interesting that, compared to the fines that were payable in cases of physical injury or theft, the fines for judicial wrongdoings tended to remain at the lower end of the spectrum.⁴⁹ Only at a later point of the development is it evident that certain *leges* removed civil compensation from the fine and thus developed a somewhat separate concept of pure civil liability of judges, a development of particular importance to our subject.⁵⁰ The system of composite fines in early medieval law and the branching off from civil compensation was almost identical with the development of Roman law. There, too, punishment initially entailed the infliction of an evil (killing or bodily injury) on the wrongdoer, which expiated the wrongful act and gave satisfaction to the victim. Later, money compensation was introduced. At first, this was only the voluntary redemption of ancient vengeance; in later times it continued to exist as the sole form of punishment under private law and became an obligation imposed on the wrongdoer.⁵¹

⁴⁸ Schmitt-Weigand, *Rechtspflegedelikte*, 132: “Die Buße hat vielmehr einen gemischten Charakter, da die im Unrecht liegende Störung der Rechtsordnung und die Beeinträchtigung der Vermögensinteressen noch nicht abstrakt getrennt sind und daher auch keine Trennung der sich aus dem Unrecht ergebenden Rechtsfolgen vollzogen ist. Die Buße ist sowohl Privatstrafe...als auch die Summe für den Ersatz des Schadens.”

⁴⁹ *Ibid.* at 42 and 127.

⁵⁰ *Ibid.* at 133: “In einem jüngeren Entwicklungsstadium verselbständigt sich auch die Schadensersatzquote, nachdem sie lange mit dem Strafteil zusammen in der Buße enthalten war.”

⁵¹ Kaser, *RPL*, 166-168, 182-184 and 249; Van Zyl, *Roman Private Law*, 330-331; Wesel, *Geschichte des Rechts*, 181: “Hier [in the Law of Delict] nimmt das staatliche Recht seinen Ausgang, zunächst immer in ungetrennter Einheit von Privatrecht und Strafrecht, Privatstrafrecht...Typisches Kennzeichen von Privatstrafrecht sind Bußen, die höher sind als der Schaden.”

4 JUDICIAL LIABILITY FOR WRONG JUDGEMENTS AND DENIAL OF JUSTICE

Provisions for judicial wrongdoing that emerge from the early medieval sources are mainly of two types: denial of justice and wrong judgements. Wrong judgements – *non secundum legem iudicare* – implied two things: the misapplication of a relevant regulation of the *lex* by the judge and, additionally, infringement of the general postulates of justice. In the light of the strict formalism that prevailed in early medieval law, it is obvious that a wrong judgement lay wherever the judge or the *rachinburgii* decided contrary to the written law. Generally, judges could not exercise any discretion; only the legally more advanced Lombardians recognised discretionary decisions. A case had to be referred to the king whenever a question of law arose that was not resolved by the *lex*.⁵²

From the Visigothian *Breviarium Alarici*, it appears that judges were obliged to know and respect the law:⁵³ “*Perpensas serenitatis nostrae longa deliberatione constitutiones nec ignorare quemquam nec dissimulare permittimus.*”⁵⁴ This was more than a mere technicality. A few passages later, the *Breviarium* ordered that judges who disregarded prescripts had to face punishment: “*Multabuntur iudices, qui rescripta contempserint aut distulerint.*”⁵⁵ Civil sanctions against judges receded into the background, as is colourfully illustrated by a passage from the *Breviarium*, whereby a judge who decided contrary to the laws had to be deported to an island.⁵⁶

In various passages, we are confronted with typical instances of judicial wrongdoing. Once again reference is made to judges who, owing to partiality towards one party or from

⁵² McKitterick, *Carolingians*, 101: “A count would judge according to a case, consult the codes and see if there was a stipulation covering it. If there was not, then he would have to decide by himself to appeal to the king. In other words, the law codes are to be understood as working drafts, subject to alteration and addition.”

⁵³ For more details on regulations of judicial liability in the earliest Visigothian codification, see the most recent study by Siems, *Bestechliche und Ungerechte Richter*, 515-523. And further, Schmitt-Weigand, *Rechtspflegedelikte*, 69-76; Cohn, *Justizverweigerung*, 141-155 (with regard to denial of justice).

⁵⁴ *Lex Romana Visigothorum*, C. Theod. I.1.2 from Siems, *Bestechliche und Ungerechte Richter*, 516 fn30. While researching this thesis at the University of Cape Town I did not have access to the editions of the various *leges*. However, I have used the rich material provided *inter alia* by Schmitt-Weigand, Siems, Padoa Schioppa and also Cohn for citation of the primary sources. The respective reference will be included at the end of each footnote.

⁵⁵ *Lex Romana Visigothorum*, C. Theod. I.2.5 from Siems, *Bestechliche und Ungerechte Richter*, 517 fn33.

⁵⁶ *Sententiae Pauli* V.25.4: “*Iudex, qui contra sacras principum constitutiones contrave ius publicum, quod apud se recitatum est, pronuntiat, in insulam deportatur.*” From Siems, *Bestechliche und Ungerechte Richter*, 518 fn37.

irresponsibility, did not give a hearing to the other party. Quite typically for this early form of development, judges were ordered to pay a fine at the value of the suit not to the other party, but to the state.⁵⁷ Thus, it appears that the Visigothian kings began to develop an interest in the proper administration of justice and secured this interest by means of direct control over the judges. In a sense, therefore, one may speak of mixed compository and disciplinary liability in early Visigothian law.

Amazingly, the *lex Romana Burgundionum* does not deal explicitly with any kind of judicial accountability, let alone civil judicial liability. On the other hand, there are some interesting references in the *lex Burgundionum*. Particularly noteworthy is a passage from the so-called *Prima Constitutio*, a preceding procedural manual.⁵⁸ Here, for the first time, a clear distinction is drawn between instances of wrong judicial decisions on grounds of corruption and on grounds of naivety or carelessness (*per simplicitatem aut negligentiam*). In case of the former, the judge was sentenced to death; in the latter case, the judge was ordered to pay 30 *solidi* and the case was reheard.⁵⁹ Unfortunately, it is not possible to verify whether the money was to be paid to the king or to the injured party.

According to a passage from the Lombardian *Edictum Rotharis*, dukes or *iudices* who denied justice in cases of actions for material restitution had to pay 20 *solidi* each to the king and the plaintiff. In addition, the case remained pending.⁶⁰ The Lombardian law provided for fairly refined distinctions with regard to wrong judicial decisions. In a complementary statute to the *Edictum*, enacted by King Liutprand (712 A.D.-744 A.D.) in the year 721 A.D., it was

⁵⁷ *Lex Romana Visigothorum*, C. Theod. II.1.6 Interpretatio. From Siems, *Bestechliche und Ungerechte Richter*, 519 fn47.

⁵⁸ Generally with regard to Burgundian law see Cohn, *Justizverweigerung*, 104-110; Padoa Schioppa, *Ricerche Sull'Appello*, vol.I 127-132; Schmitt-Weigand, *Rechtspflegedelikte*, 78-81; Siems, *Bestechliche und Ungerechte Richter*, 527-530; Schmidt-Speicher, *Rechtsbeugung*, 18-19.

⁵⁹ *Lex Burgundionum* Pr.Const.11: "Si quis sane iudicum, tam barbarus quam Romanus, per simplicitatem aut negligentiam praeventus, forsitan non ea quae leges continent iudicabit et a corruptione alienus est, XXX solidos se noverit solviturum, causa denuo discussis partibus iudicanda." Taken from Schmitt-Weigand, *Rechtspflegedelikte*, 81 fn587, see also Siems, *Bestechliche und Ungerechte Richter*, 529 fn100.

⁶⁰ *Edictum Rotharis* 25: "Si quis res suas ab alio in exercitu requisiverit et noluerit illi reddere, tunc ambulit ad ducem; et si dux illi aut iudex, qui in loco ordinatus est a rege, veritatem aut iustitiam non servaverit, componat regi et cui causa est. solidos viginti, causa manente." From Schmitt-Weigand, *Rechtspflegedelikte*, 41 fn298 and also Siems, *Bestechliche und Ungerechte Richter*, 531 fn112. For more details on judicial liability under Lombardian law see Padoa Schioppa, *Ricerche Sull'Appello*, vol.I 150-172; Schmitt-Weigand, *Rechtspflegedelikte*, 41-54; Vinogradoff, *Roman Law in Medieval Europe*, 22-24.

accepted for the first time that discretion was an essential aspect of the process of judicial decision making. If a judge had decided on the grounds of the written law *contra legem*, he had to pay the king as well as the injured party the above-mentioned sum of 20 *solidi* each. However, if the judge decided wrongly *per arbitrium*, that is where a pertinent *lex* was missing or, in other words, he had to use his discretion to arrive at a judgement, the judge had to take an oath that he had not misapplied the law because of corruption or deliberate injustice.⁶¹ This remarkable passage thus re-introduced the notion of culpability, at least in instances where the judges had to make discretionary decisions. Negligent misjudgements in such instances were dealt with differently from deliberate ones.

To trace other indications of judicial liability in the *leges* from the middle of the seventh century onwards, we have to turn once again to the Visigoths and their *lex Visigothorum*, which applied to Visigoths and settled Romans alike.⁶² One passage of the *lex* is particularly interesting because it confirms what was said above with regard to Lombardian law, namely that a number of codifications influenced by vulgar Roman law never ceased to accept at least some notion of culpability as the base of judicial liability. In one passage it is regulated with regard to delay of justice that a plaintiff in an action against a judge had to prove the delay as well as the judge's *fraus*. *Fraus* must be understood as very near in meaning in those days to *dolus malus*.⁶³ The next passage probably contains the text that most resembles post-classical Roman law. Here, the legal consequence of judicial wrongdoing is civil liability of the judge and the requirement for liability is *dolus malus*. For cases of denial of justice, it was regulated:

“...quod si dolo aut calliditate aliqua ad hoc videtur iudex differre negotium, ut una pars aut ambe naufragium perferant, quidquid dispendiis super octo dies a die cepte accionis causantes pertulerint, reddito sacramento, totum eis iudex reddere compellatur.”⁶⁴

⁶¹ Liutpr.28: “Si iudex contra legem iudicaverit, conponat solidos quadraginta, medietatem regi et medietatem cuius causam fuerit. Et si forsitan iudex causam per arbitrium iudicaverit, et iudicium eius rectum non conparuerit, non sit culpavelis nisi preveat sacramentum regi, quod non iniquo animo aut corruptus a premio causam ipsam non iudicassit, nisi sic ei legem conparuissit; et sit absolutus. Nam si iurare non presumpserit, conponat ut supra dictum est.” From Schmitt-Weigand, *Rechtspflegedelikte*, 46 fn338; Siems, *Bestechliche und Ungerechte Richter*, 533 fn118; Padoa Schioppa, *Ricerche Sull'Appello*, vol.I 153 fn9.

⁶² Enacted during the reign of King Reccesvinth (649-672). For more details see Siems, *Bestechliche und Ungerechte Richter*, 536-545; Schmitt-Weigand, *Rechtspflegedelikte*, 66-67.

⁶³ Siems, *Bestechliche und Ungerechte Richter*, 540; Cohn, *Justizverweigerung*, 150.

⁶⁴ *Lex Visigothorum* II.2.21. From Siems, *Bestechliche und Ungerechte Richter*, 541 fn144; Cohn, *Justizverweigerung*, 142-143.

A choice text in this respect occurs in the *lex Romana Curiensis* (late eight century) which applied in parts of what is today Switzerland and northern Italy.⁶⁵ A judge who intentionally (*aut per neglegenciam aut per dilacionem*) denied justice to a party was held personally liable for the full damage.⁶⁶

In addition, with regard to the determination of the amount payable to the injured party, the *lex Visigothorum* is also comparable with Roman law. Quite remarkably, under Visigothian law, a *iudex* was liable to the injured party in cases of denial of judgement or wrong judgement not at a fixed composite fine but at the concrete value of the damage suffered by the party through the judge's mistake or incompetence. It is obvious that this provision had more of a reipersecutory character than the usual fixed fines.

If we leave aside the classical heritage within the *leges barbariorum* and turn to the apparently more Germanic *lex Salica*, we find another remarkable source in title 57, which confirms the unique role of the *rachinburgii* within the Frankian administration of justice.⁶⁷ According to this passage, it was not the judge but exclusively the *rachinburgii* who were subject to differentiated liability: in cases of denial of judgement, these *rachinburgii* had to pay a sum of 3 *solidi* to the injured party⁶⁸; where they had adjudicated against the law (*non secundum legem*), they had to pay five times that amount, that is 15 *solidi*.⁶⁹ Notably, there was apparently no indication of the relevance of any subjective or fault elements in the determination of the judges' liability in early Frankian law.⁷⁰

⁶⁵ See for details Meyer-Marthaler, *Römisches Recht in Rätien*, 44-50; Soliva, *lex Romana Curiensis*, 1930-1931; Van Zyl, *Geskiedenis*, 57-58.

⁶⁶ *Lex Romana Curiensis* II.6.2: "Si quicumque iudex aut per neglegenciam aut per dilacionem aut per qualemcumque premium hominem de sua causa dilataverit...quidquid ille homo de ipsa causa damnum habuerit omnia de ipsius iudicis facultate illi reddatur, qui apud eum iusticiam non potuit invenire." From Cohn, *Justizverweigerung*, 146.

⁶⁷ For more details on judicial liability under the *lex Salica* see Siems, *Bestechliche und Ungerechte Richter*, 546-547; Schmitt-Weigand, *Rechtspflegedelikte*, 8-14; Schmidt-Speicher, *Rechtsbeugung*, 16-18; Geffcken, *lex Salica*, 213-217; Cohn, *Justizverweigerung*, 47-71.

⁶⁸ See Geffcken, *lex Salica*, 57 or Kroeschell, *Rechtsgeschichte*, 37: *lex Salica* T.57 § 1: "Quod si illi legem dicere noluerint, septem de illis rachineburgiis, mallobergo schodo est, ante culcatum solem, CXX denarios qui faciunt solidos III singuli culpabiles iudicentur."

⁶⁹ *Ibid.* § 3: "Si vero illi rachineburgii sunt et non secundum legem iudicaverint, is, contra quem sententiam dederint, causam suam agat et si eis potuerit adprobare, quod non secundum legem iudicassent, aliis DC denarios qui faciunt solidos XV quisque illorum culpabilis iudicetur."

⁷⁰ Schmitt-Weigand, *Rechtspflegedelikte*, 12: "Die Bußen wurden offenbar ohne Rücksicht auf den Grund der Urteilsverweigerung verwirkt, mochten die Rachimburgen nun in doloser Absicht oder aus Gesetzesunkenntnis kein Urteil

To turn to the *lex Baiuvariorum*, once again, owing to the influence of the Visigothian codifications, we are faced with more differentiated regulations.⁷¹ According to the prevailing opinion, in early Bavarian law prior to the integration of the duchy into the Carolingian empire, justice was administered by a single judge. Hence the reference in the *lex* is not to the *rachinburgii* but to a *iudex*. In cases of wrong judgements given *contra legum nostrarum statuta*, a judge was liable for a sum that made good twice the amount involved in the case he had wrongly judged. Again, Bavarian law refers to typical examples of judicial misbehaviour, namely to miscarriage of justice due to corruption: Where “*Iudex si accepta pecunia...*”, this judge was considered to have acted intentionally⁷²; whereas a wrong decision on the basis of an error, *per errorem*, was invalid and the judge was considered to have acted without fault. In modern terminology, he was, in a sense, justified.⁷³ Unlike the Frankian *lex Salica*, subjective criteria evidently played a role.⁷⁴ The Bavarian *lex* extended the Visigothian antecedent in that it not only granted to the injured party double compensation but, in addition, imposed on the judge an obligation to pay to the state (*fiscus*) a disciplinary fine of 40 *solidi*. The Bavarian dukes took a serious interest in the proper administration of justice.

Similar regulations can be found in the *lex Alamannorum*. Liability for wrong judgement lay at a fine of 12 *solidi*. In addition, compensation was payable to the injured party by the judge if the latter deliberately misapplied the law, for example, though desire, envy or fear. Whether liability was attached to negligent misjudgements remains a matter of doubt. Furthermore, it is not entirely clear whether the fine was payable to the state or to the injured party. Civil

sprechen.” And Cohn, *Justizverweigerung*, 58 observes: “Das Gesetz macht keinen Unterschied bezüglich des Grades der Verschuldung der einzelnen Urtheiler...”.

⁷¹ For details on the Bavarian and Alemanian *leges*, see Siems, *Bestechliche und Ungerechte Richter*, 551-554; Schmitt-Weigand, *Rechtspflegedelikte*, 83-85 and 87-88; Schmidt-Speicher, *Rechtsbeugung*, 18-19; Brunner, *Deutsche Rechtsgeschichte*, 360-361; Cohn, *Justizverweigerung*, 155-157.

⁷² *Lex Baiuvariorum* II.17: “*Iudex si accepta pecunia male iudicaverit, ille qui iniuste aliquid ab eo per sententiam iudicantis abstulerit, abalata restituat. Nam iudex perperam iudicaverit, in duplum ei cui damnum intulerat cogatur exsolvi, quia ferre sententiam contra legum nostrarum statuta praesumpsit: et in fisco cogatur XL sold persolvere.*” From Siems, *Bestechliche und Ungerechte Richter*, 552 fn185, also Schmitt-Weigand, *Rechtspflegedelikte*, 88 fn636.

⁷³ *Lex Baiuvariorum* II.17: “*Si vero nec per gratiam nec cupiditatem, sed per errorem iniuste iudicavit, iudicium ipsius in quo errasse cognoscitur, non habeat firmitatem, iudex non vocetur ad culpam.*” From Siems, *Bestechliche und Ungerechte Richter*, 552 fn186; Schmitt-Weigand, *Rechtspflegedelikte*, 88 fn638.

⁷⁴ This point is made by Schmidt-Speicher, *Rechtsbeugung*, 18: “Gerade in der Behandlung der Verschuldensfrage unterschieden sich die fränkischen Stämme von denen der anderen deutschen Stämme.” Schmitt-Weigand, *Rechtspflegedelikte*, 88: “...jede bewußte Rechtsbeugung [sollte] erfaßt werden...”.

compensation covered the actual damage and, unlike the Bavarian *lex*, lack of knowledge apparently was not available to the judge as a defence.⁷⁵ Once again, both *leges* contain references to some of the typical reasons for judges' misapplication of the law, for example, corruption or fear.⁷⁶

The remaining *leges* enacted during the reign of the Carolingians,⁷⁷ namely the *lex Thuringorum*, *lex Saxonum* and particularly the *lex Frisionum*, do not contain any regulations with regard to judicial liability and accountability. The reason for this must be seen in an important alternative means of Carolingian administration which at the same time came to the fore: the so-called capitularies or royal constitutions.⁷⁸ The capitularies received their name from their arrangement into chapters (*capitularia*). They were not part of an abstract general codification but, rather, single concrete ordinances of the kings. The capitularies symbolised the fading within the Frankian monarchy of the persistent spell of the vanished Roman Empire, which, as we have seen, continued to affect the administration of the Germanic kingdoms up to the early eighth century.

Like their crossing⁷⁹ of the traditional Roman administrative and cultural border of the Rhine for the conquest of the North and East (Friesland, Saxony, Thuringia),⁸⁰ the ideal of being truly Christian rulers who brought to their people the kingdom of God while on earth was a new direction in which the Carolingian kings and emperors moved. Charlemagne defined this endeavour as the *norma rectitudinis*, the binding scale of absolute justice and fairness which implied a duty to protect the king's poor subjects (*pauperes*) from his more powerful ones

⁷⁵ *Lex Alamannorum* 41.1: "Si autem per cupidatem aut per invidiam alicuius aut per timorem contra legem iudicaverit, cognoscat se deliquisse et 12 solidos sit culpabilis, cui iniuste iudicavit, et quod per illum damnum passus est inuste, ille iudex restituat ei." From Schmitt-Speicher, *Rechtspflegedelikte*, 84 fn610; Siems, *Bestechliche und Ungerechte Richter*, 554 fn193.

⁷⁶ Schmitt-Weigand, *Rechtspflegedelikte*, 88: "Für die Redaktoren waren eben die Bestechlichkeit die typische Ursache und Gewinnsucht das typische Motive für absichtliches Falschurteilen, und so drückten sie das Allgemeine durch den typischen Fall aus."

⁷⁷ Until 711-911 A.D. in Germany and until 987 A.D. in France.

⁷⁸ For this form of enactments, see Van Caenegem, *Historical Introduction*, 21-24; Hahlo and Kahn, *Legal System*, 378; Van Zyl, *Geskiedenis*, 63-64; Kroeschell, *Rechtsgeschichte*, 73-77 with further references. For a more detailed account of the (comparably advanced) administration of the Carolingian empire see McKitterick, *Carolingians*, 77-103.

⁷⁹ The Carolingians were an Austrasian, that is Germanic, noble family which came to hold the position of *maior domus* of the Merovingians, who in turn remained more of a Gaulish-Roman dynasty.

⁸⁰ Kroeschell, *Rechtsgeschichte*, 71 states that the Rhine: "...noch lange nach dem Abzug der Römer, ja bis ins Mittelalter hinein, eine Kulturscheide blieb, und zwar auch in verfassungshistorischer Hinsicht."

(*potentes*).⁸¹ This new ideal of the Carolingian kings, as well as their emphasis on administrative law, is also evident from the relevant regulations on judicial liability and accountability. In fact, what is commonly known as the Carolingian reform intensively focused on the proper administration of justice.⁸² No longer was the relation between the judge and the injured party of crucial importance, but that between the erring judge and the king.⁸³ Thus, a strong disciplinary element was introduced into early medieval Frankian law of judicial liability.

Various capitularies deal in depth with judicial carelessness, partiality and corruption with regard to wrong and unfair judgements.⁸⁴ Judges were supposed to know the law they had to apply. Judges had to take an oath before God and his *locum tenens* on earth, the king, to adjudicate in a correct manner according to their (legal) knowledge, without accepting any presents.⁸⁵ These demands document a remarkable ecclesiastical influence, and scholars have pointed to both Charlemagne's advisor Alcuin and to St Isidore of Seville as the sources of this enduring influence and inspiration.⁸⁶ Undoubtedly, the Carolingians increased the

⁸¹ See Kroeschell, *Rechtsgeschichte*, 75 and Van Caenegem, *Historical Introduction*, 21; Fouracre points to the influence of Alcuin on Charlemagne and states in *Carolingian Justice*, 778: "It was the ruler's duty to protect his people as vigorously as possible, and ...to lead them to salvation through a constant supervision of their moral life...". Note also his comments at 779.

⁸² Aspirations and reality of which are the general theme of the excellent contribution by Fouracre, *Carolingian Justice*, quoted extensively throughout this chapter.

⁸³ Fouracre, *Carolingian Justice*, says at 779 that when "...legislation came down to specifics, the subject was often the conduct of presiding judges." Note further Siems's comments in *Bestechliche und Ungerechte Richter*, 559.

⁸⁴ See particularly the references in Siems, *Bestechliche und Ungerechte Richter*, 556 fn199 and Fouracre's reference in his *Carolingian Justice* at 779 to the two famous Carolingian reform capitularies, the *Admonitio Generalis* of 789 and the so-called Programmatic Capitulary of 802.

⁸⁵ Fouracre, *Carolingian Justice*, 777 states: "The idea of righteous kingship committed to the eradication of corruption found clearer expression in the reign of Charlemagne...". And at 779 he remarks that the demands of the kings "...boiled down to demands that those in the field [of administering justice] act more justly, resist bribery, flattery and perjury and defend the churches, the poor, widows and orphans." Note also Hlotharii *capitulare missorum*, a 832, Cap.II.202.c.5.p 64: "*De iudicibus inquiratur, si nobiles et sapientes et Deum timentes constituti sunt; iurent, ut iuxta suam intelligentiam recte iudicent et pro muneribus vel humana gratia iustitiam non pervertant nec differant et, quod iudicaverint, confirmare sua subscriptione non dissimulent.*" From Siems, *Bestechliche und Ungerechte Richter*, 556 fn199.

⁸⁶ See Siems, *Bestechliche und Ungerechte Richter*, 558; Fouracre, *Carolingian Justice*, 778-779; Köbler, *Bilder*, 66 and Kelly, *Western Legal Theory*, 99-100 for details.

pressure on judges.⁸⁷ Deficient *counts* had to be reported to the Emperors, and faced admonition and dismissal.⁸⁸

In conclusion, it may be said that early medieval law on judicial liability was characterised by three main aspects:

As distinct from Roman law, civil judicial liability was no longer included in a complex system of delictual liability. Frequently, it was blended beyond recognition with criminal or disciplinary regulations. It simply became part of an unsystematised catalogue of compository fines granted to an injured party. Only sporadically does civil liability in its true sense appear from the sources. There was no worked out and underlying theory of causation or fault that applied in an abstract and generally applicable manner to the various examples of infringements of rights by judges. On the other hand, subjective criteria in respect of judicial liability did not decline entirely in all *leges*. Some codifications continued to include references to deliberate or intentional acts on the part of the judge, which had to be present before liability could arise. Infrequently there were even clear allusions to *fraus* and acts committed *dolo malo* as well as to negligence.

Secondly, there is an analogy between the development of Roman law and the development of early medieval law. In both instances⁸⁹, it was initially the compensation of the injured party vis-a-vis the judge that received the main attention. Later, however, a somewhat mixed approach appeared. Mainly for policy reasons, judicial liability was retained in Roman law as a preventative measure by way of an indirect threat of liability which was easily imposed on the judge by an injured party's individual claim. A similar, albeit not identical, concept of an anticipated sanction seems to have emerged in the development of medieval law, where there were provisions for a fine payable to the state (for instance in the Lombardian and Bavarian *leges*), as well as for dismissal and control of judges (in the Carolingian capitularies). The conceptual difference from the Roman system lay in that in early medieval law the kings could truly avail themselves not only of an indirect control device, but of immediate royal

⁸⁷ As to their success, however, Fouracre's comments in *Carolingian Justice*, 780, 791 and 794-795 have a critical undertone.

⁸⁸ See Siems, *Bestechliche und Ungerechte Richter*, 558-559, with reference to fnn211 and 212.

⁸⁹ It is obvious that one has to be very careful in speaking of a uniform early medieval legal system. At present the term is used only to exemplify parallel tendencies in development.

disciplinary powers.⁹⁰ It is in this sense that St Isidore of Seville's remark as to the kings' generating fear of them applies here.

Finally, it is noteworthy that early medieval law did not address itself to cases of infringement of personality rights by judges. This was probably because Roman vulgar law (from about the fourth century) had already lost a fixed concept of *iniuria*, and *iniuriam facere* had come to mean defamation as well as unjustified damage to property.⁹¹ Apparently, in the rough and ready days of the early Middle Ages, the protection of personality was not a flower that could flourish within society or in court.

However interesting these early medieval regulations may appear, they left hardly any traces in the further development of the concept of judicial liability. The general pattern of development of the *ius commune* in the legal orders of continental Europe from the eleventh century onwards, which were based predominantly on either the incorporation of Roman law as it was cast by Justinian's *Corpus Iuris Civilis* or on the emerging principles of canon law, makes it apparent that the simplistic or even archaic early medieval *leges* had to pale into insignificance before more advanced systems or schools of thought.

5 PROCEDURAL ASPECTS AND THEIR PRACTICAL IMPLICATIONS

The above categories of pure as well as mixed forms of civil judicial liability in early medieval law provide us with some theoretical knowledge. But what were the practical implications of judicial liability in early medieval law? How and at which court could an aggrieved party sue a judge? What were the chances of obtaining judgement against a judge or the law-speakers? Finally, what was the connection between judicial liability and the possibility of appeal, if such a concept existed?

⁹⁰ Siems, *Bestechliche und Ungerechte Richter*, 559 says: "Man setzt nicht auf nachträgliche Sanktionen, sondern auf Vorwirkung durch Vorgabe von Maßstäben, Überwachung, Druck und letztlich sogar Austausch der Funktionsträger." However, Schmidt-Speicher, *Rechtsbeugung* at 17, remains sceptical. For the development in Roman law see above text at chapter II 2 3 fn 176-179.

⁹¹ Levy, *Vulgarrecht*, 327; Walter, *Actio Iniuriarum*, 58.

The crucial effect of the development of a comprehensive appellate system on judicial liability in Roman law has been described in the previous chapter. It has been stressed, further, that the aspect of appeal is of particular importance throughout the entire historical development of judicial liability. Under the Roman formulary system, judicial liability was necessary to mitigate the consequences of the lack of any system of appeal.⁹² Similarly, under the early medieval legal systems, a party who felt primarily aggrieved by a judge or a court had no access to appeal in the ordinary sense to a higher court.⁹³ The sole possibility for a party to challenge the proposal or the final judgement was submission of a counter-proposal. The Frankians referred to this as the *Schelte* (scolding of a judgement).⁹⁴

That the challenging of a judgement or a proposal bears only a slight resemblance to an ordinary appeal is clear from its immediate outcome in those none too gentle days, namely a serious attack on the integrity of the judge or the proposers of the judgement. In other words, the *Schelte* in itself was a delict and gave ground to an entirely new dispute. In the earliest days, particularly in Frankia, this dispute was decided instantly before the court by means of formal evidence. The burden of proof was entrusted to the challenger. However, the modes of evidence in those days cannot be compared with today's. There were only irrational modes of leading evidence in cases of *Schelte*, for instance by oath and so-called oath-helpers or by ordeal, i.e., drawing lots or engaging in judicial battle, the *iudicium Dei par excellence*. If the plaintiff failed to win the battle, the judgement apparently was considered just and right and the plaintiff himself would have committed a serious offence which made him liable to the judge or the proposers.⁹⁵

However, during the reign of the Carolingians, the *Schelte* to some extent was supplemented by the possibility of a complaint to the *curia regis*. Aggrieved parties had the option of demanding an instant trial by battle or of petitioning the king to inquire into the challenged decision. Like the initial concept, however, this new opportunity remained a delict in its own right. It is interesting to note that this general principle is also evident from legal systems other than the Frankian, even where a challenge did not necessarily lead to trial by battle. According

⁹² See above text at chapter II 2 2 fn116-124.

⁹³ For the following section see the detailed presentation by Schmitt-Weigand, *Rechtspflegedelikte*, 134-143.

⁹⁴ Weitzel, *Gerichtsverfahren*, 1335, Kaufmann, *Urteilsschelte*, 620.

⁹⁵ Köbler, *Bilder*, 81 and Bartlett, *Trial by Fire and Water*, 105-108 but see also 114-116.

to the Visigothian *leges*, if a complaint was not upheld by the king, the complainant was obliged to pay a fine of the amount in dispute, or, in cases of insolvency, was subject to 100 lashes. In Alemanian law, the unsuccessful complainant at the court of the duke was sentenced to a fine payable to the aggrieved judge. Lombardian judges were paid by the appealing party a fine of 20 *solidi* that was imposed when the king decided that a challenged judgement had been in accordance with the law. Together with the more drastic early Frankian regulations, all these provisions have in common that unsuccessful challenges of judgement immediately amounted to delicts in their own right and led to liability of the complainant, notably at the same amount the judges had to pay for misjudgements. Unsuccessful appeals and misjudgements, to use a pictorial expression, related to each other like a mirror image.

The fact that the amount of the fine payable by both the *judge* in a case of a misjudgement, or by the *parties* in a case of unfounded challenge of judgement was identical in most of the *leges* leads to the conclusion that the procedure for compensation or a fine probably derived from the tribes' earlier regulations with regard to the *Schelte* before the king or the duke. For instance, according to the *lex Salica*, an unsuccessful party did not receive a fine of 15 *solidi* but was liable for exactly that sum to any of the *rachinburgii* whose proposal he had challenged.⁹⁶ In the days of the *lex Alamannorum*, a party had to pay a fine of 12 *solidi* to the judge whose judgement was upheld, and the same used to apply in Lombardian law where half of the fine of 40 *solidi* was given either to the judge or to the complainant, depending on the final judgement of the king.⁹⁷ And under the *lex Visigothorum*, the losing party was obliged to pay the judge the value of the case at dispute as a fine, the same consequence being imposed on a judge for misjudgement. Only the alternative of corporal punishment was more severe for the unsuccessful party, who received 100 lashes compared to a mere 50 lashes inflicted on the judge.⁹⁸

In the light of the fact that a complainant ran a high risk of having imposed upon him exactly the same fine he expected to have imposed on the judge, the question arises to what extent judicial liability was only a theoretical postulate in those days. It is self-evident that a complainant had to be very sure of his grounds before challenging a judicial decision. Meanwhile, it must not be overlooked that under the earlier *leges*, especially in Frankian and

⁹⁶ Above text at 4 fn69.

⁹⁷ Above text at 4 fnn 60 and 75.

Lombardian law, the counts responsible locally became the judges of the folks' courts. Undoubtedly, they were very influential and wealthy local figures and it was exactly that position of power that had led to their selection. In addition, there were many counties which did not see their kings for decades, and even the Carolingian royal *missi* frequently were not seen for months. Thus, it seems quite unlikely that there were many *pauperes* in the early Middle Ages who seriously tried to bring the judicial errors of the local courts before the king, leave alone the option of trial by battle. In this regard, Paul Fouracre referred to the problem of how to "...distrain the well-off, and to bring the powerful to justice...".⁹⁹ However, the procedure might have been of practical importance where the complainant enjoyed a similar social status to that of the count or the *scabini*.¹⁰⁰

⁹⁸ Above text at 4 fn62 *et seqq.*

⁹⁹ *Carolingian Justice*, 798.

¹⁰⁰ Schmitt-Weigand, *Rechtspflegedelikte*, 142 observes: "...daß die Praxis des frühen Mittelalters in vielen Punkten anders ausgesehen haben wird...und das der Kampf ums Recht für den weniger Mächtigeren vermutlich sehr mühselig und erfolglos gewesen ist." This point is also stressed by Fouracre, *Carolingian Justice*, 790-791 who states: "What all these people [those involved in the fair administration of justice]...had in common with the counts was a certain degree of social privilege which was at least in part derived from their role in the judicial process, and which meant that it would be difficult to bring them to justice."

"Et in iudicialibus iudex negligens facere iustitiam delinquit in Deum, et in principem, et in partem."

(Paridis de Puteo¹)

IV LATE MEDIEVAL ITALIAN LAW

1 THE POSITION AND STATUS OF JUDGES IN THE MEDIEVAL ITALIAN ADMINISTRATION OF JUSTICE

1.1 Introduction

With respect to the Middle Ages J M Kelly has aptly said:

"By 1100 the era of Germanic migration, understood in the widest sense to include the adventures of the Vikings and Normans which came long after the fall of the Western Roman empire, was more or less over. The waves had reached almost the last recesses of the shore...Something like European stability, at any rate in comparison with the 'Dark Ages', was in sight."²

Europe's population, trade and economy began to grow. The most remarkable regions in this process were undoubtedly northern Italy and Flanders, both of which will have our attention in this chapter and the next.³ In Italy, where the classical Roman urban traditions had never died, the highest standard of urbanisation was reached in the north, particularly in Lombardy and Tuscany.

T B Macaulay once wrote:

"During the gloomy and disastrous centuries which followed the downfall of the Roman Empire Italy had preserved, in a far greater degree than any other part of Western Europe, the traces of ancient civilisation. The night which descended on her was the night of an Arctic summer. The dawn began to reappear before the last reflection of the preceding sunset had faded from the horizon. It was in the time of the French Merovingians and of the Saxon Heptarchy that ignorance and ferocity seemed to have done their worst. Yet even then the Neapolitan provinces, recognising

¹ De Puteo, *De Syndicatu*, 563 n.6.

² Kelly, *Western Legal Theory*, 114.

³ For a noteworthy approach to trace the common roots of particularly Italian and Flemish Renaissance in the field of history of art see Castelfranchi Vegas, *Italien und Flandern*.

the authority of the Eastern Empire, preserved something of Eastern knowledge and refinement. Rome, protected by the sacred character of her Pontiffs, enjoyed at least comparative security and repose. Even in those regions where the sanguinary Lombards had fixed monarchy, there was incomparably more of wealth, of information, of physical comfort, and of social order, than could be found in Gaul, Britain, or Germany.”⁴

From Italy and her preserved urban civilisation intellectual rebirth spread to other parts of Europe, later becoming the momentum for the Renaissance in its true sense.⁵ It was also Italy that provided for a change from a closed and essentially agricultural manorial economy to a market economy. International commerce and trade, enormous circulation of capital and increasingly refined banking began to characterise business in the influential northern Italian cities of Milan, Venice, Florence, Genoa, Pisa and others.⁶

These cities, which are commonly described as city republics (although one may not draw too broad a comparison with the characteristics of modern republics), were ruled and controlled by a relatively developed and effective central administration. In other words, the Italian cities became the forerunner of politico-systematic changes that were to sweep through Europe: the emergence of the sovereign and centralised territorial state which in due course replaced the traditional feudal order of the fragile Germanic kingdoms, where monarchs in constant fear of too powerful local rulers had to maintain a perpetual circuit of their territories in order to secure their authority, and where there was relatively little organisation, centralisation, accountability and public mindedness. It is evident that it was the unsatisfactory state of feudal society that ultimately forced the emergence of the Italian communes as political heavyweights. The kings and their feudal potentates barely managed to control upper Italy. There was no co-ordination and no shaping policy, and central administration was an illusion. In practice, real authority in northern Italy was local authority.⁷

⁴ Macaulay, *Machiavelli*, 66-67.

⁵ A very interesting model of the general process of assimilation of classical culture in medieval Europe has been suggested by Mandonnet, *Siger de Brabant*, 1 *et seqq.* Mandonnet distinguishes three different phases: the first is based more on social aspects during the early Middle Ages, when the remaining Roman institutions were eagerly revived by some of the monarchs of that period, as the whole movement of the *renovatio imperii* makes particularly evident. A second, more scientific phase, took place in the twelfth and thirteenth centuries, namely widespread acceptance of Greek philosophy and natural sciences as well as the revival of jurisprudence, most noteworthy in Italy. Finally, there is the phase Mandonnet describes as the aesthetical, from the fourteenth to sixteenth centuries, when classical styles of art, architecture or literature were widely adopted. This period is the one we describe as the Renaissance.

⁶ The earliest banks in the modern sense were founded as early as the twelfth century at Genoa and Venice. See Hahlo and Kahn, *Legal System*, 467. Generally with regard to the economic revival that commenced from the tenth century see Martines, *Power and Imagination*, 9-12 and the compendium by Piergiorgio, *Growth of the Bank*.

⁷ Martines, *Power and Imagination*, 12.

In the legal sphere, too, Italy set the scene for the revival of more refined concepts than in Germanic law, although the latter had been enriched to some degree by Roman vulgar law. The first law school, subsequently followed by numerous others, emerged at Bologna, around 1100 AD, under the leadership of a man named Irnerius. He and his followers, the so-called *quattuor doctores* and their students, pioneered the study of the *Digest* of Justinian, which carried the wealth of classical Roman legal authority which had been lost in the mist of the 'Dark Ages' for more than 500 years. With the other three parts of his compilation, Justinian's *Corpus Iuris Civilis* as it now came to be known, received intense attention from scholars, as well as from the emperors, the popes and the trading community in the Italian cities. Each of these parties evoked the authority of the recovered Roman law for their individual legal, political or economic purposes.

The sophistication of its legal material made Roman law particularly suitable to meet the scale of new demands. Thus, it was first the school of the Glossators (c.1100-c.1250) and later that of the Commentators (c.1250-c.1400), that established Roman law "...as the supreme expression of legal and political reason, and set its course which would lead to its reception into, and fusion with, the relatively less sophisticated native systems of the medieval states..."⁸ Of this process, the later course of development in the Netherlands is another excellent example.

The rebirth of Roman legal science had, among other effects, a direct influence on the development of the Italian judiciary.⁹ Initially, the teaching of Roman law at the universities provoked a revolutionary form of systematic legal training. In due course, the rising Italian cities were supplied with lawyers trained and highly skilled in Roman law who could serve as judges, notaries, advocates or officials, replacing the traditional laymen.¹⁰ Not only did the personal experience change, but also the institutions that administered justice. Soon most of the multi-member courts of the type organised during the early Middle Ages, whose members were typically laymen, were replaced by small and comparatively efficient courts of professional judges.¹¹

⁸ Kelly, *Western Legal Theory*, 122.

⁹ Drawn from the title of Engelmann's work *Die Wiedergeburt der römischen Rechtskultur in Italien*.

¹⁰ Dawson, *Oracles*, 124-125. For details see below at 14.

¹¹ Engelmann, *Wiedergeburt*, 53; Classen, *Richterstand*, 72; Dawson, *Oracles*, 131 with further references at fn9.

Finally, judicial accountability and liability came to be dogmatically keyed into the relevant principles of post-classical Roman law of judicial liability. Meanwhile, certain aspects of medieval law clearly went beyond and modified the Roman concept of judicial liability, the most important being the emergence of so-called syndication, a procedure in every respect extraordinary for an action against a judge.

1 2 The system of administration of justice and relevant factors in its formation

It is practically impossible to refer to a uniform system of administration of justice in Italy in the High Middle Ages. For the purposes of this work, the most relevant developments took place in the northern Italian city republics. It is desirable, hence, to concentrate on the developments in this area. Italy itself was split into three major regions: the Norman south, the Pontifical State in central Italy and the north which, from the eleventh century onwards, resembled increasingly a checkerboard of self-willed cities and the territories belonging to them and of the numerous territories under the control of episcopal or feudal potentates. In theory, at least, they all were subject to the bearers of the Italian crown, the German emperors. In practice, Italy was nothing more than a geographic expression – the Italian peninsula.¹²

The economically booming cities of the north soon emerged as political strongholds. The movement in favour of self-government resulted from growing emancipation of the communes from their feudal municipal rulers. Generally, these were the bishops who had already been granted rights by the German emperors prior to the wars of investiture.¹³ During the fierce investiture controversy, which wholly absorbed papal and imperial resources, the cities took advantage of the moment of weakness of both opponents and created their own elected and independent self-governing institutions.¹⁴ Professor Lauro Martines neatly described this process as follows:

¹² Martines, *Power and Imagination*, 7.

¹³ See generally *ibid.* 12-21. Castagnetti, *Mark Verona-Treviso*, 32-34 with regard to Verona.

¹⁴ Classen, *Richterstand*, 45-46; Martines, *Power and Imagination*, 8-9. For Milan see Keller, *HZ* 211 (1970), 55-60.

“Between about 1080 and 1130, in town after town, the budding commune reached out for more and more self-government, using one power against the other, pope against emperor, bishop against antibishop, or papists against imperialists. The commune triumphed.”¹⁵

This unique process of communal formation was based upon gradual encroachment characterised by two distinct approaches: men of rank and property in the city formed voluntary associations and then reached out for the political power of the city's ruler or else turned the existing associations into citizens' bodies with public jurisdiction. Thus, the formation of the Italian communes may properly be described as an act of political and social assertion where local leaders – after years of the considerable instability of feudal and papal authority¹⁶ – were resolved to have self-government. By the end of the twelfth century, municipal autonomy had been completely established: the cities' new rulers soon levied taxes, organised local police forces, legislated local statutes and administered law, recruited soldiers or declared war and peace on behalf of the citizens (*pro se et sociis suis*) and not in the name of the former rulers, i.e., the bishops (*pro se et pro domino nostro episcopo*). Not *de iure* but certainly *de facto*, the cities emerged as independent bodies within the empire.¹⁷

At first, most of the cities were ruled by the so-called *consules*, who were elected for one year by the municipal council.¹⁸ Hence, reference is frequently made to the consular commune as the early form of city government.¹⁹ The emerging communal constitution may be defined as:

“...an association of men bound together by an oath and common interests. They swore to aid and to defend one another. They pooled their prestige and their minute jurisdictions...and they invested their consuls...with executive and judicial powers. The associates – that is, the members of the commune – swore to obey and follow the consuls, who in turn swore to defend and uphold the association in all its rights and interests.”²⁰

Consequently, the *consules* held wide legislative, executive and judicial functions. Judicial powers, which are of particular interest to us, were frequently vested in the body of *consules*

¹⁵ Martines, *Political Violence*, 340 and Keller, *HZ* 211 (1970), 61.

¹⁶ Martines, *Power and Imagination*, 18-21. See also *Political Violence*, 340-342.

¹⁷ Martines, *Power and Imagination*, 21 states: “Once the commune won recognition, it pressed inexorably for more and more power, until it had the bulk of local authority *de facto*, whatever the claims of ceremony and legal theory.” Note also Martines, *Political Violence*, 341 and Fried's comment in his excellent work *Juristenstand* at 77: “*Was der Kaiser 1158 zurückforderte, hatte sich der ‘populus’ längst genommen.*” With regard to the quotes in the text see quotes see Fried, *Juristenstand* at 78. Dilcher, *Lombardische Stadtkommune*, 170-177 which contains a valuable overview of the usurping of the so-called *regalia* or sovereign rights.

¹⁸ For a detailed description of the consular commune see particularly Martines, *Political Violence*, 26-29; Sbriccoli's enlightening analysis in *Justice*, 37-44; Fried, *Juristenstand*, 73-80 (Bologna) and 174-180 (Modena).

¹⁹ For the origins of the term ‘commune’ see Hyde, *Faction and Civil Strife*, 279-283.

²⁰ Martines, *Power and Imagination*, 27.

itself, as was the case at Verona, Vercelli, Perugia, Modena (until 1171) or Milan. Thus, jurists had to perform both political and judicial tasks.²¹ Generally, the sub-divisions of the consulate were staffed by consuls who had been councillors (*assessores*) of the former courts of the bishops or *margraves*.²² At Milan, apparently, four of these *consules iustitiae* sat as a municipal court with general jurisdiction.²³ Similar regulations applied at Verona and Vercelli.²⁴ Or, as was the case at Perugia, the consuls sat together with especially appointed local professional judges.²⁵ Frequently, however, the body of *consules* remained an executive organ, devoid of any judicial functions, as was the case at Pisa, Parma and Bologna.²⁶

Professor Classen's discussion of the situation at Pisa includes the example of a body of consuls who did not form a consular court but called upon judges to administer justice in the name of the city. In the second half of the twelfth century, three courts existed at Pisa, namely the *curia legis*, the *curia usus* and the *curia appellationum*. The first court, staffed by three so-called *iudices publici*, adjudicated according to written law, which was Langobardian and Roman law, and, from 1160, according to the first book of the local statute of Pisa, the *constitutum legis*.²⁷ The five judges (*previsores*) of the *curia usus* applied common law, which, from 1160, was embodied in the second book of Pisa's statute, the *constitutum usus*. A court of five judges (*cognitores*), the *curia appellationum*, functioned as a court of appeal.²⁸ What is essential to take note of here is that from the end of the eleventh century the early medieval bipartite system whereby judges and law-speakers were involved in the process of adjudication was replaced by a more advanced system, a system where a single judge or a

²¹ All references in what follows to the variety of local statutes issued by the cities have been drawn directly from the works of Classen, Kantorowicz, Fried and of course Engelmann. With respect to the consuls see Classen, *Richterstand*, 47: "Es gab also einen vergleichsweise kleinen Kreis von Juristen, der mit sehr großer Kontinuität an der Stadtdirektion teil hat..."; Engelmann, *Wiedergeburt*, 53-54; Ficker, *Italien*, 317-321. For a study of the developments of the Umbrian town of Perugia see Blanshei, *Perugia*, 164-165. With regard to Modena see Fried, *Juristenstand*, 182.

²² For example in Pisa. See Classen, *Burgundio*, 16. Fried, *Juristenstand*, with regard to Bologna, 78. See also Engelmann, *Wiedergeburt*, 54, Ficker, *Italien*, 316-317.

²³ Classen, *Richterstand*, 46.

²⁴ Engelmann, *Wiedergeburt*, 54.

²⁵ Maire Vigueur, *Justice et Politique*, 314.

²⁶ Classen, *Richterstand*, 68-75; Engelmann, *Wiedergeburt*, 54; Ficker, *Italien*, 316-317; Martines, *Power and Imagination*, 29; Fried, *Juristenstand*, 80: "Nach 1150 delegierten die Konsuln in Zivilsachen die Richter, wie sie auch sonst Beamten ernannten."

²⁷ For details on this remarkable codification see Classen, *Richterstand*, 82-88.

²⁸ Classen, *Richterstand*, 70-72 the number of judges at the various courts, however, was subject to alteration. The numbers indicated here represent the year 1163.

bench of judges was responsible for the entire law suit, including the finding of facts *and* law, that is for the decision as such.²⁹

After the end of the wars of investiture and the *interregnum*, the emperors from the house of *Hohenstaufen* temporarily re-established the long-lost imperial authority in northern and parts of central Italy.³⁰ The cities, which in the meantime had become fairly self-confident, made an armed bid with considerable success for the preservation of the independence that they often enough had secured only by barefaced usurpation. They resisted any pressure to accept the emperors' military, political, administrative and fiscal sovereignty. A military conflict raged between the cities and the emperor Frederick I Barbarossa from 1162-1177, during which the northern Italian cities formed the so-called Lombardian Alliance. Ultimately, the conflict brought the cities closer to the papal faction which lived in strict opposition to the detested emperor. Those cities and territories Frederick I Barbarossa conquered saw the replacement of the traditional *consules* by so-called foreign *podestàs* who ruled the cities as autocratic governors in the name of the emperor.³¹ Other cities which had been more co-operative and did not rebel against the reinstitution of imperial power were granted the right to choose a domestic *podestà*.³²

However, after losing the battle at Legnano (1176), Frederick I Barbarossa had to accept the *de facto* autonomous status of the northern Italian cities in the Peace of Constance (1183).³³ He granted the cities the privileges, *inter alia*, of unrestricted administration of justice and of enacting their own local laws. Consequently, the cities were now empowered to determine

²⁹ This is stressed by Dilcher, *Lombardische Stadtkommune*, 173.

³⁰ For the following see Martines, *Power and Imagination*, 24-26.

³¹ Engelmann, *Wiedergeburt*, 54: "In den Städten wurden vom Kaiser fremde Potestaten (oft deutsche) als Obrigkeit eingesetzt, die auch die Justiz unter Beirat der einheimischen Rechtskundigen ausübten." Seidlmayer, *Geschichte Italiens*, 186: "...Podestà...Name und Amt sind ursprünglich staufisch-kaiserlicher Herkunft." Note further Ficker, *Italien*, 321-324; Fried, *Juristenstand*, 81-82; Stern, *Criminal Law System*, 77; Hattenhauer, *ERG*, 240 and 253 and Martines, *Power and Imagination*, 25, who deals with the podestatal government in more detail at its second stage after the formal recognition of the communes' autonomy at the Peace of Constance 1177.

³² Fried, *Juristenstand*, 82.

³³ Zorzi, *La Justice Penale*, 51; Martines, *Power and Imagination*, 26 states: "The articles of the Peace of Constance became the formal foundation of communal autonomy, and ever after the freedom of the cities was to be taken back to the imperial recognition allegedly contained there."

their own administrative, legislative and judicial organs.³⁴ Although a number of cities returned to the traditional consular constitution (eg. Bologna 1164-1194), it became obvious during the thirteenth century that the majority favoured the *podestà* constitution.³⁵ By the fourteenth century, there was practically not a single city in northern and central Italy which was not administered by a *podestà*.³⁶ The reasons for this development are fairly evident in light of subsequent political events.

The communes' consolidation from 1183 onwards soon led to intense rivalries between the cities. Their unity in their continuing struggle against Frederick's successors, Henry VI and the great Frederick II, was soon severely undermined by their tendency to separatism and internal rivalries. Some joined the emperors' faction; others, encouraged by the Pope, continued their opposition.³⁷ Or, as Andrea Castagnetti once described it:

"Verona, loyal to the emperors entered into a pact with Venice against the papal Padua, which was under the rule of a reform-conscious bishop, but also against Ravenna and Treviso regardless of the fact that the archbishops of the former were partisans of the emperor and that the latter, even though it had a count who sided with the church, was loyal to the imperial faction."³⁸

Growing partisanship found expression in two terms: *Parte Guelfa* (the papal faction and the faction of territorial independence from the empire) and the *Parte Ghibellina* (the imperial faction). These two terms echoed like war cries throughout Italy:³⁹ "*Ecclesiam Guelfa nutrit pars, Imperiumque Gibellinorum pars scelerata nimis.*"⁴⁰

³⁴ Zorzi, *La Justice Penale*, 51 states: "Avec la paix de Constance de 1183, Frédéric Ier avait reconnu aux villes italiennes la juridiction "tam in criminalibus causis quam in pecuniariis [...], tam in civitate quam extra civitatem", d'où se serait par la suite développé, de facto, ce ius statuendi qui représenta la clef de voute juridique de l'autonomie politique acquise entre-temps par les communes italiennes...au cours de décennies suivantes, la faible présence impériale permit aux communes de continuer l'érosion des prérogatives souveraines et de développer une ample autonomie." See also Martines, *Power and Imagination*, 26; Dilcher, *Lombardische Stadtkommune*, 172.

³⁵ For Bologna see Fried, *Juristenstand*, 82.

³⁶ Zorzi, *La Justice Penale*, 54; Weber, *Wirtschaft und Gesellschaft*, 761 states that during the entire thirteenth century 60 northern Italian communes elected together 5400 *podestàs*.

³⁷ Martines, *Political Violence*, 341.

³⁸ My translation of Castagnetti's work *Mark Verona-Treviso*, 35.

³⁹ The label Guelf derives from the word *Welfen*. The House of *Welfen* in Germany was antagonistic to the emperors of the *Hohenstaufen* dynasty. For many years their capital was Brunswick. Initially, therefore, it denoted the papal faction. The term Ghibelline derives from the town *Waiblingen* in Swabia nearby of which the *Hohenstaufen* originated. It indicated the imperial faction. For illuminating comments on the conflicts see especially Hyde, *Faction and Civil Strife*, 293-300. Further Seidlmayer, *Geschichte Italiens*, 138, Fasoli, *Oligarchie*, 17 and Stern, *Criminal Law System*, 116

⁴⁰ Quoted from Hyde, *Faction and Civil Strife*, 294.

Before long, polarisation gripped the cities themselves and paralysed public life. The cities' aristocratic families (*nobiles, maiores, potentes*), supposedly faithful to the emperors, clashed with the middle and lower classes, the so-called *popolo, pedites, minores*, initially organised by neighbourhood societies, later by the influential craft guilds.⁴¹ In opposition to the aristocrats, the *popolo* soon identified itself as of the *Parte Guelfa*. Although the conflict continued within the cities, as time passed the classic Guelph-Ghibelline division became too narrow to explain the political and social changes in Italy. In internal politics particularly⁴² there is no doubt that the blistering controversies within the communes must be seen against the background of a class struggle.⁴³

Until the *popolo* arrived on the scene, active citizenship was restricted to those few residents who met certain property qualifications, i.e., period of residence as well as social connections. Passive citizenship, on the other hand, which above all included full payment of taxes and military service, belonged to all residents. Only men with full-fledged citizenship were eligible for public office and participation in the communes' political councils. The *popolo* in its struggle against the two most disturbing elements, namely political inequality and fiscal injustice, evidently made growing efforts to enter the political scene, to take over government, to win representation in the councils, to staff the administration, etc.⁴⁴ Beyond this schism, however, were the divisions of internal partisanship, so that even the craft guilds were at loggerheads, not to speak of the rivalries between influential noble families.⁴⁵ Soon, any election, any political decision, any administrative measure aroused endless feuds of the

⁴¹ For an overview on the various popular organisations see Martines, *Power and Imagination*, 51-58. Fasoli, *Oligarchie*, 16-17.

⁴² Hyde, *Faction and Civil Strife*, 295-297.

⁴³ It has been a point of intense controversy, especially in the 1960s and 1970s, to what degree the communal age must be interpreted as a class struggle. For details and references see *inter alia* Blanshei, *Perugia*, 152; Becker, *Florence*, 237-245; Weber, *Wirtschaft und Gesellschaft* states at 761 that the "...*Parteibildung der Guelfen und Ghibellinen war allerdings zum Teil reichspolitisch und sozial bedingt*...". See further Sbriccoli, *Justice*, 42-44; Fried, *Juristenstand*, 78; Fasoli, *Oligarchie*, 12-17. At 20-29 Fasoli provides a very useful overview of developments in practically all the important towns of the Emilia Romagna and Piedmont.

⁴⁴ See for details Martines' account in *Power and Imagination*, 45-51, further his *Political Violence*, 333-340, especially at 339; Salzer, *Signorie*, 16-23; Fried, *Juristenstand*, 76. See also Blanshei, *Perugia*, 159-162, 171-181 and 183-185 with respect to the situation at Perugia.

⁴⁵ See Blanshei, *Perugia*, 125-126 who states that civil disorder arose from different sources, the greatest being probably "...the private feuds and vendettas of the noble consorterie...". Further Martines, *Political Violence*, 334-335.

various dynasties, families, parties and classes. The suspicions of the losers resulted in revolts and counter-revolts. No less a man than the great Dante described the state of his beloved Italy in those days in the following words:

"Italy, slave, home of anguish! Look around...search, if anywhere is peace! Those who are surrounded by one wall and one moat, they slaughter one another in eternal strife..."⁴⁶

In order to secure, amidst this hate, jealousy, conflict and confusion *intra muros*, at least some degree of administrative impartiality, the towns began to look with favour at the emperor's decision to have the cities administered by foreign administrators.⁴⁷ With regard to the situation at Florence, Professor Brucker comments: "All Florentines realised that the survival of republican government depended upon the maintenance of a certain type of internal peace and harmony."⁴⁸ To accommodate the immediate need to safeguard at least the cities' administration and to remove, in particular, the administration of justice from the permanent feuds of local partisanship, an extraordinary form of administrative government came to the fore in the form of podestatal government.⁴⁹ The swing from consular to podestatal government is evidence of the crucial need for an united authority. This need was obviously imposed by increasingly conflicting social forces within the communes and, to a degree, by wars with other cities.⁵⁰

⁴⁶ My translation from Seidlmayer, *Geschichte Italiens*, 202.

⁴⁷ For additional measures to control civil disorder at Perugia see Blanshei, *Perugia*, 195-198. For Siena see Bowsky, *Anatomy of Rebellion*, 231-233 and 270-272.

⁴⁸ Brucker, *Florentine Politics*, 85.

⁴⁹ Kantorowicz, *Gandinus*, 52: "Die Erscheinung dieser Podestàs, die als eine Art politischer Impresarios mit einer von ihnen bezahlten, alle Rollen besetzenden und eine Welt für sich bildenden Truppe zu kurzem Gastspiel von Ort zu Ort das Land durchzogen, steht in der Weltgeschichte ohnegleichen da. Sie ist geboren aus der Not der Zeit...wenigstens einigermaßen unparteiische, unbestechliche...Beamte schaffen zu wollen. Denn keine Stadt durfte hoffen, solche auf dem vom Haß und von der Eifersucht der Parteien, der Geschlechter, der Zünfte und dem Ehrgeiz der einzelnen tief durchwühlten Heimatboden zu finden." See also Zorzi, *La Justice Penale*, 54: "Le problème de l'ordre public et du controle de l'administration de la justice monopolisa, au cours de la seconde moitié du XIIIe siècle...la querelle politique entre groupes de "popolo" et forces aristocratiques." Fried, *Juristenstand*, 83.

⁵⁰ Martines, *Power and Imagination*, 42; Sbriccoli, *Justice*, 41-42 and 51-52 who affirms the view that the establishment of the *podestà* form of government has to be seen as an outcome of the situation in which the typical city society in conflict found itself. Remarkably it is this aspect which is fiercely opposed by Professor Engelmann in his *Wiedergeburt* at 15-41 and 53-72. Engelmann insists that it was the Roman legal science of the classical period which was transferred in pure form to the Italian city states and it was this 'culture of justice' that gave birth to the advanced system of podestatal government. Criticism followed *stante pede* of this fairly prejudiced historical view, by *inter alia* Wieacker, *ZfGS* 60 (1941), 591-601 and Genzmer, *ZSS (RA)* 61 (1941), 276-294. See also Dawson, *Oracles*, 135 fn1 with further references.

The *podestà*⁵¹ was elected by the city's council or a special electoral commission and was engaged by means of a formal contract for a certain period, usually six months to a year. After the termination of the contract, a *podestà* was not eligible for resumption of office in that city for many years and moved on to another city to take on a new office.⁵² The *podestà* had to be a foreigner and he was not to have any relatives in town. Usually he was a nobleman. He headed the municipal administration; but did not rule the cities politically, a power which belonged to the cities' councils acting in co-operation with the *podestà*. The *podestà* represented the city in its foreign relations, he presided at council meetings, he handled the daily affairs of administration, and sometimes even led the military forces at warfare. The words of Professor Kantorowicz, borrowing from the world of theatre to describe the *podestàs*, are unmatched:

"...[*Podestàs* were] like political impresarios who traversed the land for brief guest performances with their travelling companies whose existence was born solely from the misery of those days."⁵³

It was not necessary for the *podestà* to be a trained jurist, but he was required to have experience of public life. Officially, he was also in charge of the administration of justice. He was responsible for the hearing of all appeals. At first instance, however, justice was administered by a number of judges who belonged to the *podestà*'s entourage (*iudices potestatis*) and whom he engaged before he commenced his duties and for whom he promised to make regular provision. Undoubtedly, the judges were the *podestà*'s most important officials. The senior judge regularly functioned as vicar, that is as the *podestà*'s

⁵¹ Other terminology: *rectores*; in Rome: *senatores*. It should be noted that the *podestà* was not the only chief magistrate drawn from foreign cities. Larger communes especially had other superior foreign officers who shared administrative powers with the *podestàs* on the basis of separate jurisdictions. For instance, at Florence there existed an additional captain of the people and an executor. Generally Weber, *Wirtschaft und Gesellschaft*, 761-762. For developments at Florence see Stern, *Criminal Law System*, 33-40; Martines, *Lawyers*, 130-133; Kohler, *Florentiner Strafrecht*, 181-187; for Perugia see Blanshei, *Perugia*, 166. These officers also held judicial jurisdiction. However, for the purposes of this work it is enough to concentrate on the *podestà*. Firstly, it was the *podestàs* who appeared in practically all Italian cities and thus can be seen as the generally accepted expression of the underlying concept. Secondly, in cases of deadlock the *podestà* had precedence over all other superior officers (Martines, *Lawyers*, 133 and Kantorowicz, *ZSS (RA)* 44 (1924), 238, Fasoli, *Oligarchie*, 16-17). In Perugia in the fourteenth century there appears also a *iudex iustitie*. Blanshei, *Perugia*, 168-169 suggests that he was very much the successor of the former *podestà* whose tasks varied only slightly from his. However, the more correct view appears to be that of Maire Vigueur, *Justice et Politique*, 316, i.e., that in fact the *iudex iustitie* acted as the judge of the syndicate court who heard all charges against the conduct of the judges while in office.

⁵² Zorzi, *La Justice Penale*, 55; Martines, *Power and Imagination*, 42; Fried, *Juristenstand*, 83.

⁵³ My translation from Kantorowicz, *Gandinus*, 52. For the full quote see above fn49.

deputy.⁵⁴ The sphere of jurisdiction of a judge was identical with the jurisdiction of the *podestà*, except that the judge's extended only to one defined segment. The judges were allowed to act only where their *podestà* had jurisdiction.⁵⁵

However, distinctions in legal matters between the *podestà* and his judges were not easy to draw. At Florence, the civil judges had jurisdiction and mixed *imperium* in civil and mixed cases. Mixed *imperium* was jurisdiction over civil and minor criminal cases. However, judges also decided serious criminal cases together with the *podestà*. They even possessed the latter's power of discretion (*arbitrium*), which meant that the judge himself had discretion in proceeding, recognising and punishing. In other words, he, too, could initiate inquiry, leave out parts of pending trials or change penalties. The apparent difference was that the *podestà* retained sole *imperium* as the highest jurisdiction over all civil and criminal cases and, despite the judge's right to decide a case legally, the *podestà* had the exclusive right of sovereign sanction, as well as the power to supervise his judges since he was generally liable also for their misconduct.⁵⁶

The *podestà*'s entourage (*familia*) was not composed exclusively of judges but of a variety of other office holders. In addition, he was obliged to furnish a number of knights (*miles* or *milites*) and mounted *equi* who were responsible for the local police force; a cadre of notaries as lower-grade judicial officers; *berroarii* or *berrovarii* as subordinates of the *miles*; *bannitores* and *nuntii* who functioned as messengers. Occasionally, the *podestà* had to provide for the executioner and gaoler (*custodes carceris* or *cameris*).⁵⁷ In fact, the *podestà* was obliged to bring along with him all the personnel necessary, from his deputy down to the gaoler and the policemen.

⁵⁴ Stern, *Criminal Law System*, 50; Martines, *Power and Imagination*, 42-44; Blanshei, *Perugia*, 165-166; Weber, *Wirtschaft und Gesellschaft*, 761-762, Fried, *Juristenstand*, 84.

⁵⁵ Note, however, that it was sometimes difficult to draw a clear line between the foreign *iudices potestatis* and the local *iudices communis*. The latter also accepted the *podestà*'s authority, but, to complete confusion, only for jurisdictions subject to permanent 're-definition', as appears from Fried, *Juristenstand*, 84-87. See also text below at fn63 *et seqq.*

⁵⁶ With regard to the relationship between the *podestà* and his judges at Florence see Stern, *Criminal Law System*, 51-52. See also Engelmann, *Wiedergeburt*, 364 and 384-385 with regard to the *podestà*'s general responsibility for the members of his *familia*.

⁵⁷ For details as to Bologna see Kantorowicz, *Gandinus*, 49-63; for Florence, Stern, *Criminal Law System*, 47-62, offers most detail. Also Kohler, *Florentiner Strafrecht*, 189-196. Kohler's work is critically reviewed by Stern, *Criminal Law System*, 250-252. Further Dawson, *Oracles*, 124-125 and 134-135; Kantorowicz, *ZSS (RA)* 44 (1924), 240-241 and Martines, *Power and Imagination*, 43-44. For a general overview see Engelmann, *Wiedergeburt*, 59-62.

The actual number of judges engaged varied according to the needs and regulations of the cities' the *podestà* had contracted with. It ranged between one and eleven.⁵⁸ The judges' local jurisdiction was regulated extensively by statute law. At Bologna, according to the statutes of 1250 for instance, a *iudex vicarius* functioned as the *podestà*'s deputy. There was, further, a *iudex ad discum aquile* for civil law suits; a *iudex sindicus* who had jurisdiction for any wrongdoing committed by officials while in office; a *iudex ad discum ursi* for execution of civil judgements; as well as a *iudex ad maleficia* who was assigned responsibility for criminal law cases.⁵⁹

According to the statutes of Florence of 1415, the *podestà* had to provide for eleven judges. Of these three had to be criminal judges and six civil judges, supplemented by two *iudices collaterales*. These judges were delegated to the six *sestieri*, the quarters of Florence in those days.⁶⁰ Hence one civil judge had responsibility for one quarter. A criminal judge was in charge of two *sestieri* and a *iudex collaterale* of three. All judges had to change their jurisdiction after three months. In practice, however, it appears that by the time of the early fifteenth century, due to the dramatic decrease in the population of Florence, the *podestà* made use of only four judges.⁶¹ At Milan, for instance, the statutes of 1351 required the *podestà* to provide for seven judges, of whom two had to be criminal judges, as well as for four knights and 24 notaries. At Genoa, according to the statutes of 1363, the *podestà* was to bring only three judges, compared to seven *iudices* and another seven notaries at Perugia (statutes of 1342). Pistoja required the *podestà* to bring four judges, Brescia six, Parma two, Piacenza seven and Lucca and Mantua five judges along with various other personnel.⁶²

It must be stressed that the courts of these foreign judges formed only one, albeit the most important, part of the system of administration of justice in the cities. At Florence, for instance, from the late fourteenth and early fifteenth centuries, no fewer than 38 different courts supplemented the ordinary courts' work. These tribunals had regular jurisdiction in matters of self-governing institutions such as the guilds or in cases of mercantile law. There

⁵⁸ See Engelmann, *Wiedergeburt*, 59-61; Kohler, *Florentiner Strafrecht*, 189.

⁵⁹ Kantorowicz, *Gandinus*, 57-58; Engelmann, *Wiedergeburt*, 58.

⁶⁰ Martines, *Power and Imagination*, 49 and *Lawyers*, 133.

⁶¹ Kohler, *Florentiner Strafrecht*, 189-190; Stern, *Criminal Law System*, 48-49 and 61; Martines, *Lawyers*, 133.

⁶² Engelmann, *Wiedergeburt*, 60.

existed also a number of ecclesiastical courts since the clergy was subject exclusively to the church's jurisdiction.⁶³ Furthermore, communal officials, whose authority derived from the executive sector of government, increasingly invaded the traditional courts' jurisdiction.⁶⁴ Judges of these courts were not drawn from the *podestà*'s *familia*, but generally belonged to the local guild of judges.⁶⁵ It appears, thus, that the foreign judges were directly subordinate to the *podestà* and only then to the city of service. This characteristic feature was expressed in the common saying that the foreign judge was *iudex communis et domini potestatis*, as opposed to the *iudex communis*.⁶⁶

Prior to commencement of their office, the judges, together with their *podestà* and the remaining members of the *familia*, were sworn in. At Florence, for example, this took place at a solemn ceremony at the Dome before the 300 members of the *concilio generali* and the 90 members of the *concilio speciali*, the two corporations that assisted the *podestà* in political matters.⁶⁷ In taking this oath, the judges swore to carry out their duties of office, namely to administer justice in an equitable, manner and according to the local statutes, as well as the *ius commune*. They had to show evidence of sufficient legal training, experience and knowledge of the relevant laws, and to acknowledge responsibility for syndication that took place at the end of their term of office. Faithfulness to these duties of office (*fides*) was, beyond doubt, essential for proper administration of justice, and, as we shall see, any contravention led to delictual and criminal liability.⁶⁸

However, the traditional podestatal form of government, which was not too dissimilar from what preceded it, was destined for only temporary acceptance. From the late fourteenth century onwards, it became evident that the popular commune under the now increasingly dominant *popolo* was practically impotent in pacifying the cities. The *popolo* in opposition

⁶³ Martines, *Lawyers*, 133; Stern, *Criminal Law System*, 40-43; Zorzi, *La Justice Penale*, 54 remarks that: "A l'époque communale, presque chaque ville eut au moins deux magistratures judiciaires principales [he refers to the *podestà* and the captain of the people], et, autour d'elles, un ensemble chérent d'autres tribunaux dectoriels (administratifs, corporatifs et ecclésiastiques)."

⁶⁴ Stern, *Criminal Law System*, 40-43; Kantorowicz, *ZSS (RA)* 44 (1924), 237-238.

⁶⁵ With regard to the judges' guilds, see especially the references below 14 at fn94-96.

⁶⁶ Kantorowicz, *Gandinus*, 55; Fried, *Juristenstand*, 86 and particularly at 151-157 for the situation at Bologna and 184 and 186 with regard to Modena.

⁶⁷ Stern, *Criminal Law System*, 74-75; Kohler, *Florentiner Strafrecht*, 183-184, 192. The text of an oath can be found at Kantorowicz, *Gandinus*, 179.

was by no means the same as the *popolo* in victory. While united in opposition to the *nobiles*, the *popolo* was able to command much wider support, namely by attracting the upper middle class, lower middle and lowest class. When the *nobiles* had been weakened and political representation won, the strong guilds saw their primary aim realised and the *popolo* in the narrow sense (*senza brache*) soon lost their support.⁶⁹

It has been indicated above that the emergence of podestatal government is prime evidence of the profound and widespread unsteadiness, violence, instability and lawlessness in the republican commune.⁷⁰ The logical consequence of the inability also of the podestatal government to maintain internal order in the cities was the rise of strong leaders and their clans, the *signores*, such as the Medici, the Este, the Visconti, the Gonzaga or Carrara. The despot was expected to overcome factionalism and anarchy. In fact, not the sole but the decisive reason for his rise was that the citizens, particularly the upper middle classes, the influential bankers and merchants, were weary of conflict. They wished to have civic peace and to pursue their profitable businesses, even at the price of despotism.

Add to this the increasingly successful efforts of the most powerful and influential cities to consolidate their territories at the expense of their weaker neighbours, and renaissance Italy emerges on the map: the Kingdom of Naples, the extended Papal State and the Republics of Siena, Florence, Lucca, Genoa and Venice as well as the Duchies of Ferrara, Savoy, Milan and Mantua which stretched from Tuscany up to Lombardy.⁷¹ The rise of the *signore* meant the end of the traditional role of the *podestà*, best seen in the erosion of the traditional centres of judicial dispensation, namely the courts of the foreign judges and the appellate function of the *podestà*.⁷² The above-mentioned executive commissions and tribunals, which had already been endowed with remarkable judicial powers, managed to acquire increased jurisdiction from the traditional courts. And it was no longer the *podestà*, but either the newly formed courts of justice or the *signores* personally, who usually heard appeals.

⁶⁸ Engelmann, *Wiedergeburt*, 363-364. See also below in this chapter at 1 3 2; 3 1 and 3 2.

⁶⁹ The term *senza brache* means without trousers and described the lowest members of society. Similarly the so-called *sansculottes* played a key role in the French Revolution some 600-700 years later. See Kantorowicz, *ZSS (RA)* 44 (1924), 247.

⁷⁰ Weber, *Wirtschaft und Gesellschaft*, 761-762 and see above at fnn 45 *et seqq.*

⁷¹ For a detailed analysis see Martines, *Power and Imagination*, 66-71 and 94-102; Salzer, *Signorie*, 20-23.

⁷² For the following see Martines, *Power and Imagination*, 102-108, particularly 106-107 and further *Lawyers*, 130-142; Dean, *Criminal Justice*, 16-39. At variance is Stern, *Criminal Law System*, xvii.

In some of the cities the *podestà* was turned into a superior but ordinary administrative magistrate, subordinate to the *signore*, devoid of any judicial functions. In others, the *podestà*'s courts retained full-fledged civil and criminal jurisdiction, but appeals were heard by other organs. Often the *podestà* and the traditional courts lost even their civil jurisdiction to new institutions. Generally, the *podestà* remained a foreigner, elected by the *signore* and his wilful city council.

The consequences for the judiciary appear to have been less severe. Although the emergence of new jurisdictions filled with local judges drawn from the local guilds diminished the need for foreign judges at the traditional courts, the judiciary evidently continued to be much needed. By the time of the rise of the *signore*, the standard of legal learning, as well as the requirements that had to be met by prospective judges, had improved dramatically. Thus, the only difference for the judges was the end of constant travelling. Candidates now tried increasingly to matriculate in the judges' guilds of their mother cities in order to find an appointment at one of the courts reserved for local judges.

Even though these final developments lasted well into the sixteenth and seventeenth centuries, it must be noted that it was at the time of the podestalar government that a refined concept of judicial liability was introduced in Italian law. Hence, for the following analysis of this development, emphasis will be placed on the pre-signoral period. Moreover, in due course, judicial responsibility by means of the syndication procedure was enforced regardless of whether the judge was of foreign or local birth.

1 3 Institutional aspects

1 3 1 Independence of the judiciary

Judicial impartiality and independence was secured fundamentally by the requirement that the judges, like the *podestà*, had to be foreigners. This supposedly put an end to any conflict of interests within the judiciary. Elected local judicial officers did not necessarily have poorer legal knowledge than foreigners, but it was almost predictable that they would not remain impartial amidst internal strife. Foreign judges, meanwhile, were engaged solely on the basis

of their legal credentials and, therefore, could easily be made responsible for any errors. Moreover, because of their extraneous status, these judges devoted their time and energy exclusively to their offices and not to internal feuds.⁷³ In the interests of judicial independence and impartiality, judges were not supposed to have any relatives in the town of their service. They were not allowed to return for service under a different *podestà* for a minimum period.⁷⁴ Some statutes went as far as to prohibit any socialising with the judges during their term of office: “*Et teneatur non habere aliquam conversationem cum potestate vel aliquo de sua familia...*”.⁷⁵

According to an order of the council of the Hundred of Florence in 1299, it was regulated that neither the *podestà* nor any member of his *familia* in cases of illness was allowed to consult the same doctor longer than one month.⁷⁶ Disguised extortion was dealt with by means of a general law prohibiting the granting of loans to judges.⁷⁷ The *podestà* and his *familia* usually lived together in the *podestà*'s palace, the *podestà* being permitted to bring his wife and children to the town of service.⁷⁸ Particular importance was attached to statutorily fixed salaries. Unlike judges under post-classical Roman law, the judges of the high medieval Italian town courts did not receive a share of the court fees. On the contrary, they received a fixed monthly salary. This was paid by the *podestà*, who received a truly princely salary from the towns and had to ensure that the various members of his *familia* obtained their share.

At Bologna, Professor Kantorowicz tells us, according to the statutes of 1253, the *podestà* earned c. *lib.* 1 900 p.a. In 1294 already, he received approximately *lib.* 4 800 p.a.⁷⁹ In Florence, the *podestà* in 1287 received approximately *lib.* 6 000 p.a., which, according to the statutes of 1415, rose to *lib.* 11 550 p.a.⁸⁰ The above mentioned annual salary of *lib.* 4 800 at Bologna represented approximately 800 times the minimum of those days, which lay at c. *lib.*

⁷³ Giuliani and Picardi, *Responsabilità del Giudice*, 33-34 state: “Il sindacato costituì un efficace strumento per realizzare il diritto del cittadino al buon giudice: disinteressato, competente e responsabile.” See also Stern, *Criminal Law System*, 6-8.

⁷⁴ Kantorowicz, *ZSS (RA)* 44 (1924), 238 and 250.

⁷⁵ Kohler, *Florentiner Strafrecht*, 194.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at 193; Engelmann, *Wiedergeburt*, 66-68; Kantorowicz, *Gandinus*, 52-54; Dawson, *Oracles*, 134.

⁷⁸ Kantorowicz, *Gandinus*, 52 and 54 and *ZSS (RA)* 44 (1924), 241.

⁷⁹ Kantorowicz, *Gandinus*, 51.

⁸⁰ Kohler, *Florentiner Strafrecht*, 191; Engelmann, *Wiedergeburt*, 70.

6 p.a.⁸¹ An idea of the immensity of these sums is gained by converting them into today's figures. The annual income of a *podestà* at the end of the thirteenth century at Bologna, would equal an overall figure of c. R5 760 000.⁸² It is fair to assume that a *podestà* retained about half of this salary for himself after paying the members of his *familia*. In today's figures this would amount to a personal income of c. R2 880 000, an amount which made the profession a highly lucrative one indeed. Professor Kantorowicz indicates further that a judge at Bologna most likely earned approximately *lib.* 180 p.a., which was still 30 times the minimum of those days.⁸³ A thirteenth century judge's income would be equivalent to around R216 000 p.a. today.

1 3 2 Threat of removal and accountability

Even though problems related to this aspect will be discussed in detail below under the rubric of procedural aspects of judicial liability, a brief overview is needed at this early stage to fully appreciate the concept of judicial liability in Italian medieval law.

In essence, it was not possible to remove a judge before his contract expired. However, this might have been considered superfluous since reckoning took place at the termination of service, anyway. At the end of his term, the departing *podestà* and his *familia*, including of course the judges, were obliged to remain in the town of service for a period of about three weeks. They were subjected to a formal inquiry into their conduct throughout the entire period of their service. This came to be known as syndication.

Syndication had no precedent in Roman or Germanic law and, thus, was an absolutely novel approach to judicial liability.⁸⁴ It is interesting that, simultaneously, similar concepts appear to

⁸¹ Kantorowicz, *Gandinus*, 51. A *podestà*'s acknowledgement of receipt of salary can be found at 181-182.

⁸² The relative value in Rand was estimated as follows: according to the *Handbuch der Dritten Welt*, 34 the minimum income 1993 in South Africa was at R600 per month, that is R7 200 p.a. This value has to be multiplied by a factor 800 and 30, respectively.

⁸³ Kantorowicz, *Gandinus*, 57 fn4.

⁸⁴ For details on the whole topic of syndication see the standard work by Paris de Puteo (Paridis de Puteo de Napoli), *De Syndicatu*. Further the works by Baldus de Perusio, *Tractatus Singularis in Materia Syndicatus*; Angelis de Perusio, *De Syndicatu*; Dulceti, *De Syndicatu* and Cataldini (Cataldinum de Boncompagnis), *Tractatus in Materia Syndicatus* and furthermore Amodeus's *Tractatus Syndicatus* and his work *De Syndicatu*. With regard to secondary sources generally,

have developed in south-eastern France, particularly in the Duchies of Savoy, Geneva, in the *Dauphiné* as well as in parts of the *Massif Central* in central France, and also in Spain where it was known as the *residencia* procedure.⁸⁵ Like any other official, a judge could be called to account for misconduct in office. Besides civil liability, which we will discuss in detail below, syndication provided for the institution of a criminal action against the holder of a judicial office who committed a wrong.

The idea behind syndication, which was to have a decisive effect on the further development of judicial liability, was to ensure strict obedience to the law by the judiciary. Over the period of service, the judges had been paid enormous salaries by the cities they had contracted with. They had been granted extensive rights and had wielded enormous power. Their independence and impartiality was secured by severe laws. Their considerable powers were granted purely as a desperate effort to guarantee the effective and just administration of justice and to allay the hatred and the suspicions that pervaded the towns. However, if the foreign judges did not

Engelmann, *Wiedergeburt*, 514 *et seqq*; Giuliani and Picardi, *La Responsabilità*, 32-37; Dawson, *Oracles*, 134-138; Crescenzi, *EG* 4 (1983) 383-391; Padoa Schioppa, *Ricerche Sull'Appello*, vol.II 201 fn16; Schrage, *Legal History* 17 (1996) 105; with regard to developments at Florence see Masi, *RISG* 1-2 (1930), 43-115 and 331-411; Martines, *Lawyers*, 143-145; Stern, *Criminal Law System*, 137-149.

⁸⁵ For details see Leguay, *Syndic*, 371-372. For the developments in Spain see the work by Bermudez Aznar, *Corregidor*. For a useful overview on the situation at Castile see Elliot, *Imperial Spain*, 81-87. It is fascinating to see the far reaching similarities between the development of the municipalities in Castile in the thirteenth and fourteenth centuries and that of the Italian communes. Castilian cities also were given charters of liberties (*fueros*) that granted vast areas of communal land to the municipalities, as well as rights to form a general assembly (*concejo*), which initially was staffed by the heads of the most influential local families (*vecinos*). The *vecinos* in turn elected the various municipal officials, amongst them ordinary administrative officers (*regidores*) and, of course, a number of judicial officers (*alcaldes*). Alongside these officials there appeared from the fourteenth century onwards a new institution, the so-called *corregidor*, who came from outside the town to supplement the local government officials. Like the early *podestàs* in Italy who were designated by the *Hohenstauffer*, the *corregidor* was elected by the king. When the Crown in fifteenth-century Castile collapsed, the cities increasingly came under pressure from local magnates and competing factions within and were frequently divided by feuds and disorder. When Queen Isabel won the crown and moved on to restore the internal order of the towns, the *corregidores* were the chief instrument created to realise her ambitious goal. The *corregidores* were assigned administrative and judicial duties. They had to originate from another city and remained in office only for two years. They were not required to be legally trained; hence, they were advised by two *alcaldes mayores* and assisted by a number of the local judges (*alcaldes*). However, jurisdiction remained with the *corregidores*. Finally, similar to the *podestà*, at the termination of his term the *corregidor* was subject to an inquiry into the conduct of his office, the so-called *residencia*. As a matter of fact the pattern of development in Spain might serve as an additional argument to those that have been forwarded (*inter alia* by Wieacker and Genzmer) to counter Engelmann's high flying thesis of a culture of justice which he considered the fountain of the podestatal form of government. See above at fn50.

comply with the law, the rules, the duties and the oath that guided their office, they were held accountable for any mistake or omission.

1 4 Professionalism and legal education of judges

Undoubtedly, judicial knowledge and training improved dramatically during this late medieval period. During the early consular commune, based upon the early medieval model, members of the local community adjudicated as lay judges.⁸⁶ Already by the end of the consular commune, however, a considerable degree of professionalism had begun to prevail.⁸⁷ Even though judicial functions were still performed by citizens of the towns and not yet by foreigners, it is evident that local statutes required at least some judges to have some kind of legal qualification.

A good example in this respect is Pisa. Two oaths of office, the so-called *brevia consulum* of the years 1162 and 1164, have been preserved. These *brevia* regulated in much detail the various obligations and duties of the judiciary.⁸⁸ They also provide a useful overview of the judges of the three courts of justice at Pisa. All three judges of the *curia legis*, at least one judge of the *curia usus* and two judges of the *curia appellationum* had to be so-called *legisperiti* or *legisprudentes*. The meaning of the term *legis peritus* is not explained. It appears, however, that the *legis periti* were men who were capable of applying the *constitutum legis* and the legal material contained in this law book, namely Langobardian and Roman law. These men (also frequently termed *iurisperiti*) had to have some legal qualification to be eligible for their high judicial office. In this they were distinguishable from men involved in legal matters who had nothing but a superficial knowledge of law, the so-called *sapientes*.⁸⁹ The emergence of the terms *legis periti* or *iurisperiti* indicate the formation of a legal profession.⁹⁰

⁸⁶ Engelmann, *Wiedergeburt*, 53; Giuliani and Picardi, *Responsabilità*, 32: "...il giudice comunale non era un funzionario di carriera...". See also above at 1 2.

⁸⁷ Engelmann, *Wiedergeburt*, 341-342.

⁸⁸ With regard to these *brevia* see Classen, *Richterstand*, 69-70.

⁸⁹ Classen, *Richterstand*, 72-73 and *Burgundio*, 16-17; Fried, *Juristenstand*, 167.

⁹⁰ This is the general theme of Fried's work *Juristenstand*. For his own conclusions see especially at 36, 170, 244 and 247-251. See further Horn, *Soziale Stellung*, 129-136. Only a brief overview can be provided here.

The only institutions in the second half of the twelfth century that imparted detailed legal knowledge, particularly of Roman law, were the newly founded universities. The pattern of development in Pisa is evidence that, from the twelfth century, Italian communes increasingly relied on legal professionals for the progressive administration of justice, and that lay judges were being driven out of the ranks of the judiciary. It further indicates growing interaction between legal education at the universities and the demands of the 'market', especially in the northern Italian towns. Fried makes the point that:

"The annual appointment of a *podestà*, the steady increase in communal judicial posts, even more so the demands of a society in which one did not enter into a contract or make a will or testament without having consulted a jurist, all caused a considerable increase in the demand for (legally) trained jurists."⁹¹

Unlike England where the training for the legal profession was taken out of the hands of the universities well into the nineteenth century, the Italian (and later other continental European) universities became the smithy of legal training.⁹²

A growing tendency to staff the courts with professional lawyers also appears from the statutes of other cities. At Verona in the twelfth century, for example, 8 of the 24 judges had to be trained lawyers. At Vercelli, lay judges were only allowed to give judgements by consent, or, as was the case in Como, only in cases up to the amount of 100 *solidi*.⁹³ Another feature of the formation of a legal profession can be seen in that, from the twelfth century, only members of the newly emerging local guilds of judges and notaries, the so-called *societates*, *collegia*, *fraternalia* or *artes* (entry to which was reserved for trained jurists) became

⁹¹ "Die jährliche Berufung eines Podestà, die Zunahme der kommunalen Richterstellen, die Bedürfnisse der gesamten Gesellschaft, die keinen Vertrag, kein Rechtsgeschäft, kein Testament mehr ohne Beisein von "iudices" abschloß, erhöhten den Bedarf an Juristen." My translation of Fried, *Juristenstand*, 158. One might add that trained lawyers entered other fields besides local/foreign judgeships. To name just a few: they became advocates (*advocati*), notaries, administrative advisors (councillors) of their mother towns, were employed on the ruler's *curiae* or in the service of the church. As advocates and notaries, particularly, jurists had an important impact on medieval politics as the wars on investiture or the famous dispute of Frederic I Barbarossa and the Italian towns on the occasion of the imperial diet at Roncaglia 1158 show. See Horn, *Soziale Stellung*, 132-134; Fried, *Juristenstand*, 160.

⁹² De Wet, *Liability for Wrongful Conduct*, 169; Engelmann, *Wiedergeburt*, 341; Kantorowicz, *ZSS (RA)* 44 (1924), 237-239. Social consequences of the increased demands of the 'market' are stressed by Horn, *Soziale Stellung*, 131: "Die soziale Geltung der studierten Juristen entfaltet sich in dem Maß, in dem sich dieser Anspruch verwirklicht, d.h. Fachkenntnisse...nachgefragt werden und Ämter und öffentliche Funktionen von diesen besetzt werden." With regard to the situation in England see Van Caenegem, *Historical Introduction*, 79 and fn105 as well as below at chapter VI 1 3.

⁹³ See Engelmann, *Wiedergeburt*, 47, 54 fn2.

eligible for local judicial office:⁹⁴ “Who was not matriculated from the guilds could not render a judgement, nor give a *consilia*.”⁹⁵ Professor Martines refers us to the procedure of matriculation of the Modena guild of judges and advocates in the late thirteenth and early fourteenth centuries. After paying his matriculation fee, the applicant was screened by the guild consuls and, not more than eight days later, he had to present himself before a board of eight judge-lawyers. The applicant was required to bring along the *Digest* and open the book at any page he wished and to discuss the chosen passage with the judges. He passed the examination if he won all eight votes.⁹⁶

The growing appreciation of legal knowledge, training and education in this period is further evident from another fact. The term *iudex* in medieval Italian law, as previously, retained some degree of ambiguity.⁹⁷ Besides its frequent usage to describe the bearer of judicial office as such, it was a title, an honour.⁹⁸ Titles which appear to have been granted, especially in the eleventh and early twelfth century, were either the so-called *iudices domini imperatoris* or *domini regis*, *aule regie*, *aule imperatoris*, *civitatis* as well as *iudices sacri Lateranensis palatii*. Judges were granted these honours regardless of any immediate connection with specific judicial offices, by either the emperors or the popes, in recognition of their legal abilities and knowledge, which, particularly in comparison with the earlier state of affairs, must have been impressive.⁹⁹ The bearers of these titles could act either as judges or as legal advisors to (higher) courts, to the bishops or to the kings. From the second half of the twelfth century, however, the meaning of the term *iudex* again assumed a different nuance: *iudices* were now persons who enjoyed legal training at a law school and who were *exclusively* occupied with the administration of justice in the courts.

⁹⁴ Generally see *ibid.* 47-48. For Florence see Stern, *Criminal Law System*, 53 and most detailed Martines, *Lawyers*, 26-40. For Perugia see Maire Vigueur, *Justice et Politique*, 325-326 and Blanshei, *Perugia*, 151; for Siena see Bowsky, *Anatomy of Rebellion*, 246-247. For Bologna (*societas doctorum, advocatorum et iudicum*) and Modena (*collegium iudicum et advocatorum*) see Fried, *Juristenstand*, 44, 163 and 225.

⁹⁵ My translation from Fried, *Juristenstand*, 44.

⁹⁶ Martines, *Lawyers*, 32-33. Further Fried, *Juristenstand*, 225.

⁹⁷ Fried, *Juristenstand*, 24 states: “Das lateinische Wort “iudex” hatte seit römischer Zeit manchen Bedeutungswandel erfahren. Die höheren Beamten spätantiker Zivilverwaltung und die Verwalter des Königsgutes in karolingischer Zeit hießen in gleicher Weise “iudex”, hatten aber sonst nicht viele Gemeinsamkeiten und unterschieden sich ebenfalls wieder von den “iudices” Oberitaliens im 11. Jahrhundert.” This confirms what has been said in chapter II 1 3 fn88 and 259 and chapter III 2 fn37.

⁹⁸ A comprehensive overview is provided by Fried, *Juristenstand*, 24-36.

⁹⁹ Classen, *Richterstand*, 73-74 and *Burgundio*, 15.

Under the emerging *podestà* constitution, judges were without exception required to be trained jurists. In keeping with the improvement and expansion in the education of practising jurists at the law schools, the demands placed on the judiciary for legal expertise increased. Ultimately it became evident that the smaller communes in particular were unable to provide a sufficient number of capable local jurists to staff the courts. And, increasingly, local lay judges were unable to match the knowledge of the jurists who appeared before them. It is not surprising that the cities took action and required compulsory legal training at an Italian university before a judge could be engaged by a *podestà*. The statutes of Bologna of 1250 required local jurists to have passed at least five years of legal studies at a university:

*“Et nullus possit esse iudex communis nec vocari ad aliquod dandum consilium nisi ipse studuerit in scolis V annis in legibus.”*¹⁰⁰

Four years of study were required according to Vicenza’s statutes from the year 1264.¹⁰¹ The 1328 statutes of Modena declared that a judge had to have studied for five years.¹⁰²

A meaningful distinction, however, was made between merely legally trained judges, judges who were legal scholars, the so-called *doctores*, and scholars at law at one of the law schools, the so-called *doctores actu legens*.¹⁰³ For a doctoral degree in civil law, lawyers were required to have attended law school for six to nine years and to have passed a certain examination.¹⁰⁴ To obtain an ordinary law degree, which soon came to be obligatory for a judgeship, it was necessary to have studied law for at least five years.¹⁰⁵ In consequence of these requirements, legally trained judges were expected to have a command of the legal curriculum taught at any university, that is the basic (*ordinarie*) principles and the general theories of law including the *Codex* and the *Digestum vetus*. *Doctores* were expected, beyond the legal basics, to be skilled

¹⁰⁰ Quoted from Horn, *Soziale Stellung*, 135.

¹⁰¹ Engelmann, *Wiedergeburt*, 48; Fried, *Juristenstand*, 163.

¹⁰² Martines, *Lawyers*, 33; Fried, *Juristenstand*, 225.

¹⁰³ With regard to the *doctores* see Fried’s overview at *Juristenstand*, 9-24. With regard to the *doctores actu legens* see the footnote directly below.

¹⁰⁴ Kantorowicz, *ZSS (RA)* 44 (1924), 237; Weimar, *Doktorwürde*, 425-442. Weimar makes the point that, initially, the doctoral degree qualified one to lecture at the University of Bologna and was not considered a qualification for a legal career outside the university. By the late thirteenth century, however, the University had separated admittance to the college of teachers, including *venia legendi*, from conferral of the doctoral degree. Thereafter, the degree must be considered an academic title. See also Fried, *Juristenstand*, 21 and particularly 22 as well as Hahlo and Kahn, *Legal System*, 492 fn47.

¹⁰⁵ Stern, *Criminal Law System*, xi and 52-53; Martines, *Lawyers*, 31 and 33; Fried, *Juristenstand*, 160 fn20 and 163.

in the handling of the (*extraordinarie*) sources of Roman law, the *ius commune*, the Gloss and the statutes. Later, they were supposed to have knowledge of the *communis opinio*, as well as the principles of interpretation of legal and statutory sources.¹⁰⁶

At Bologna, for example, the *podestà* had to provide for three judges *forenses, legales et sapientes atque instructos in iure, facto et consuetudine* who had practised for a minimum of five years.¹⁰⁷ According to the statutes of 1454, of the five judges that were required, at least two had to be *doctores legum* of ten and five years standing, respectively. At Milan, the vicar had to be a *legum doctor*. Similar regulations in other cities, namely Florence, Rome, Perugia, Pavia, Bergamo, Genoa, Verona and Orvieto, required the *podestà* elect to bring with him at least one to three *doctorati, sufficientes doctorati, bonus jurista de melioribus* or *legum doctores*.¹⁰⁸ Here must be noted the important tendency to make distinctions within the judiciary according to the expected degree of legal knowledge. Upon this important preliminary question was based the assessment of whether or not a case of breach of duty was to be presumed where unambiguous evidence of wrongdoing was lacking, or, in cases of *imprudencia*, at what amount the judge was liable.¹⁰⁹

The other side of the coin is that, for two reasons, syndication or judicial liability played a considerable role in evoking and intensifying further reception of Roman law.¹¹⁰ Firstly, since there might be liability for practically every kind of judicial wrongdoing, judges tried to escape possible accusation of lack of legal knowledge. Hence, from the twelfth to the thirteenth century, they depended largely on the authority of the Glossators, the legal doctors and experts of that age, and finally on Accursius' Great Gloss in order to base their judgements on recognised principles of law.¹¹¹ Consequently, judges, or rather their fear of

¹⁰⁶ Engelmann, *Wiedergeburt*, 358-359; Fried, *Juristenstand*, 225-226.

¹⁰⁷ *Ibid.* at 60. A remarkable account of both the legal education and professional career of the well known Italian jurist Albertus Gandinus is provided by Kantorowicz, *ZSS (RA)* 44 (1924), 230.

¹⁰⁸ Engelmann, *Wiedergeburt*, 60-62; Stein, *Römisches Recht und Europa*, 52-53; Kohler, *Florentiner Strafrecht*, 189 with regard to Florence.

¹⁰⁹ Engelmann, *Wiedergeburt*, 345 and 358. See below at 3 1; 3 2 and 3 6 2 for details.

¹¹⁰ For the following see generally Kelly, *Western Legal Theory*, 122-123; Hahlo and Kahn, *Legal System*, 489-496; Van Caenegem, *Historical Introduction*, 47-55; Stein, *Römisches Recht in Europa*, 80-85 and 117-122; De Vos, *Regsgeschiedenis*, 51-62; Engelmann, *Wiedergeburt*, 179-186, 215-228 and 338; Wesel, *Geschichte des Rechts*, 311-313.

¹¹¹ Engelmann, *Wiedergeburt*, 192-194 (with respect to the Great Gloss): "Noch viel wirksamer war die umfassende Haftung der Richter und Gerichtsberater nach gemeinem Recht für die Schädigung einer Partei...Diese Haftung...mußte

syndication, played a large part in promoting the exaggerated importance given to university scholarship.

As the Great Gloss receded into the past in the fourteenth and fifteenth centuries, new themes and legal problems emerged for the successors of the Glossators, the Commentators. The heart of the Commentators' approach was not merely the application of the exegetical method, i.e., the assimilation and comprehension of the *Corpus Iuris* by means of formal logic, but the correlation of Roman law with the law of their times, with customary and statutory law and even social realities. They adapted the acquired law to the needs of their time and worked out doctrines of practical value. They used the former to enrich the other sources of law and thus helped it to play a vital role in legal practice.¹¹² Soon it was the so-called *communis opinio*, the common opinion, in which *inter alia* the views of Bartolus and Baldus carried primary weight, that took over the authoritative position of the Great Gloss. The extraordinary prestige Bartolus carried is well evidenced by the famous jingle: "*Nemo romanista nisi bartolista*".

For the constitution of the common opinion it was certainly not necessary for all scholars to agree on the point in question. It sufficed that those authors who agreed on it had the greatest renown as well as the strongest arguments on their side. It was not merely a counting but a weighing of the opinions at stake.¹¹³ When in doubt, the judges preferred to follow the common opinion rather than to stumble into liability for lack of knowledge in following a minor opinion, or as Paridis de Puteo once put it: "*Et iudex excusatur in syndicatu, si est secutus opinionem alicuius Doctoris vel glossatoris, licet faciat iniustitiam.*"¹¹⁴ These practical observations indicate that there existed a hierarchy of legal sources in the *ius commune* that the judge was obliged to follow when he was about to decide a legal problem. First, he had to check whether or not there was explicit legislation, either in the *Corpus Iuris Civilis* or in statute law. The common opinion of the scholars or *doctores* was to be followed as a guideline where no legislation of any kind applied or had to be interpreted, or where law

die Richter allgemein zur Befolgung anerkannter Lehren und im Zweife zur Befolgung der durch Autorität gesicherten Auffassung veranlassen."

¹¹² Van Caenegem, *Historical Introduction*, 50; Hahlo and Kahn, *Legal System*, 493.

¹¹³ Dolezalek, *Stare Decisis*, 14; Kelly, *Western Legal Theory*, 122.

¹¹⁴ De Puteo, *De Syndicatu*, 552 n.2. Note further Engelmann, *Wiedergeburt*, 222, 228-229 (with respect to the *communis opinio*): "Die Autorität des berühmten Namens und der vorherrschenden "*communis opinio*" mußte in der Praxis ebenso wirksam werden wie früher die Autorität der Glosse, weil sie den Richtern die gleiche Gewähr für die Vertretbarkeit...der Meinung bot."

texts did not provide for a solution, so that arguments had to be drawn from analogous legal situations. Where no such authority applied, the judge was, so to speak, unbound by authority and free to decide for himself.¹¹⁵

This strong leaning in practice towards the common opinion in turn increased the pressure on the law schools to adapt their teaching from exclusive reference to the Great Gloss and led, later, to the singling out of the *communis opinio*.¹¹⁶ Ultimately, the *doctores* themselves became involved in the process of administration of justice since judges increasingly sought their advice (*consilia*) in difficult or doubtful cases in order to escape liability. To the extent that external experts' *consilia* was formally binding on judges, the latter were usually exempt from all personal liability.¹¹⁷

In analysing the pattern of development, meanwhile, the fruitful circulation of institutional and legal models and the formation of uniform judicial practice in the fields of the *ius commune* and statute law that came in the train of the *podestàs*, their judges and other functionaries in their continuously moving up and down town and country should not be overlooked.¹¹⁸

The emergence of podestatal government, the acquisition of foreign professional judges by the cities, the existence of judicial liability in cases of the slightest *culpa* and, consequently, the growing tendency of judges to follow slavishly the legal authorities are all striking aspects of the background to civil judicial liability, which will now be discussed in more detail.

¹¹⁵ A useful overview is provided by De Puteo, *De Syndicatu*, 552 n.1-555 n.7; Cataldini, *Tractatus in Materia Syndicatus*, nn. 33-35, n.38 and n.49. Further note Amodeus, *Tractatus Sindicatus*, nn.122-123.

¹¹⁶ Engelmann, *Wiedergeburt*, 178-179: "Das Glossenwerk des Accursius...hat nicht nur den Rechtsgelehrten eine wertvolle Vorarbeit für die wissenschaftliche Erkenntnis...geboten, sondern auch den Rechtslehrern und ihren Schülern...die nötigen Hilfsmittel zum selbständigen Gebrauch der Quellen geliefert." Further at 239: "...beschränken die Rechtslehrer ihre Ausführungen in den Vorlesungen...auf die Wiedergabe von Äußerungen berühmter Rechtslehrer und die Feststellung der vorherrschenden Meinung...". See also his comments at 338.

¹¹⁷ Engelmann, *Wiedergeburt*, 408-415.

¹¹⁸ This is aptly stressed by Zorzi, *La Justice Penale*, 55. Further Weber, *Wirtschaft und Gesellschaft*, 762.

2 DEVELOPMENTS IN THE LAW OF DELICT AS A BACKGROUND TO JUDICIAL LIABILITY

With regard to the applicable principles of delictual liability, the medieval Italian jurists, the so-called Glossators and their successors, the Commentators, relied almost entirely on the *Corpus Iuris Civilis*. Consequently, legal principles derived from Germanic law became increasingly irrelevant in Italian legal practice, particularly so with respect to judicial liability. None of the above-mentioned Frankian or Langobardian concepts of judicial liability succeeded in the long run.

Although the Italian doctrine made extensive use of the fault requirement, of *dolus* and *culpa*, this terminology was by no means identical with our modern terminology. Any wilful conduct that was directed either at an undutiful or unlawful result was considered as fault at large or *culpa* in a broad sense. In order to stress the uniformity of the fault requirement, Bartolus introduced a scheme of five different degrees of *culpa* in the wider sense, namely *culpa latissima*, *culpa latior*, *culpa lata*, *culpa levis* and *culpa levissima*.¹¹⁹ The first two were indicative of *dolus*, that is *dolus verus* and, somewhat more constructively, *dolus praesumptus*, whereas the remaining three indicated *culpa* in a narrow sense.

In light of the development of Italian law, it may be said that *culpa latissima* or *dolus verus*, that is the 'true' *dolus*, never reached the scope of our modern concept of intention. This is true not so much with regard to the direction of the will and consciousness of wrongdoing, but as regards the general scope of the term *dolus*. *Dolus* remained essentially *dolus malus* as it came to be understood by Justinian. Hence, it indicated particularly reprehensible conduct. It was described by a wide range of meanings: as the opposite of *bona fides*, that is as *mala fides*, as *malitia*, as *animus nocendi* or as *fraus*.¹²⁰ It is evident that these meanings of *dolus* correspond only to some extent with our modern concept of intention, which requires a wilful and conscious act regardless of the criterion of reprehensibility. In our modern view, fraudulent intent (*Arglist*) is no longer considered the sole typical appearance of *dolus* but merely the morally most objectionable.

¹¹⁹ Engelmann, *Schuldlehre*, 18-19; Wesenberg and Wesener, *Privatrechtsgeschichte*, 49.

¹²⁰ Engelmann, *Schuldlehre*, 37-38 and *Wiedergeburt*, 355.

Further, Italian jurists accepted that *dolus* required a person's consciousness of the unlawfulness of his or her conduct.¹²¹ This is obvious from the use of the term *mala fides*, which in those days, as distinct from (for example) modern South African law, indicated not merely the motive behind an act but a particularly reprehensible attitude, which undoubtedly entailed consciousness of unlawfulness. Paulus Castrensis stated generally in an advice that *dolus* could lie only where someone was actuated by malevolence, not where he was actuated by something he consciously considered lawful.¹²² Errors as to fact (*error facti*) as well as to law (*error iuris*) and mere ignorance of law (*ignorantia iuris*), consequently, played an important role in determining (judicial) liability for *dolus*.¹²³

Whereas *dolus verus* remained in substance *dolus malus*, the category of *dolus praesumptus* must be seen as new.¹²⁴ Since it played a considerable role in judicial liability, a brief overview is in place. There were two categories of *dolus praesumptus*, one substantial (*dolus praesumptive essentialis* or *dolus ratione essentiae*)¹²⁵ and one formal (*dolus praesumptive probatus* or *dolus respectu probationis*). For the purposes of this thesis, it suffices to describe further the formal category, which denoted something of a procedural trick to establish *dolus*, an artifice, so to speak, where, for various reasons, *dolus* could not be ascertained. Hence, the object of the formal *dolus praesumptus* was simply to avoid the still frequent deficiencies in the law of evidence of those days.¹²⁶ The underlying idea was that unless evidence to the contrary had been established, the judge would assume that the usual course of events had taken place (the presumed course of events) and that the person involved had acted with *dolus*.

Such a presumption shifted the onus of proof to the person against whom the presumption operated. The Italian jurists developed three distinct types of formal presumptions:

¹²¹ Engelmann, *Schuldlehre*, 41-49, Engelmann, *Irrtum und Schuld*, 250-251.

¹²² *Consilia*, vol.II c.277 n.4: "...movetur ad aliquod malum propter solam malignitatem animi, non propter aliquid aliud, quod credit esse bonum."

¹²³ Engelmann, *Irrtum und Schuld*, 250-255 and *Schuldlehre*, 41-49.

¹²⁴ For the following see the detailed treatment by Engelmann, *Irrtum und Schuld*, 56-76, *Schuldlehre*, 127-135. An useful overview is also provided by Pauw, *Persoonlijkheidskrenking*, 48-52. Further Dolezalek, *Stare Decisis*, 16-17.

¹²⁵ The *dolus praesumptive essentialis* denoted another type of *dolus*. It was an intermediate form of culpability somewhere between the most severe form of *dolus*, i.e., *dolus verus*, and the severest form of *culpa*, i.e., *culpa lata*. See Engelmann, *Schuldlehre*, 129.

¹²⁶ Engelmann, *Schuldlehre*, 130.

praesumptiones iuris, *praesumptiones necessaria*, and *praesumptiones iudicis*. The so-called *praesumptiones iuris* were regulated by legislation. Judges were obliged to apply them while hearing evidence. Such a legislated presumption was considered non-rebuttable and therefore it produced a legal fiction. Another type of presumption was the *praesumptio iudicis* (also *praesumptio probabilis, facti, hominis, naturae*). This presumption was not regulated in legislation and it was left to the judge to decide in the circumstances of the case whether there was sufficient indication of the existence of *dolus*. This presumption was rebuttable by the defendant when leading evidence to the contrary. It was also acceptable that the defendant, against whom the presumption operated, took an oath (*iuramentum purgationis*).¹²⁷ A special appearance of the *praesumptio iudicis* can be seen in the presumption of consciousness of unlawfulness in cases where all elements of *dolus* were certain and the defendant's final resort to a plea of *error iuris* appeared to be highly incredible. Here the presumption of consciousness of unlawfulness, therefore, led also to a presumption of *dolus*.

To return to the general outline of delictual liability it may be said that, generally, Justinian's model structuring the law of obligations, including the various categories of delictual liability, was preserved. However, the common opinion apparently favoured a five-fold instead of the four-fold scheme that had prevailed in Roman law. It consisted of contract, delict, quasi-contract, quasi-delict and *variae causarum figurae*.

The *actio legis Aquiliae* retained its role as delictual action *par excellence* on the basis of liability for *dolus* and *culpa*. The *actio* also retained its characteristic mix of civil (reipersecutory) and criminal action. However, there are some indications that the emphasis was already being placed increasingly on its reipersecutory aspects.¹²⁸ Furthermore, distinctions between the initial *actio* and its extensions, the *actiones utiles* and *actiones in factum*, slowly began to fade. Initially, the *actio* remained restricted to liability for direct causation of physical damage to a corporeal being. However, with the emergence of the doctrine of *interesse*, the tendency to apply it in addition to cases of direct causation of patrimonial loss came to the fore. Indirectly inflicted patrimonial loss remained non

¹²⁷ Engelmann, *Irrtum und Schuld*, 75-76. See also Schmoeckel, *Humanität und Staatsräson*, 201-204 for further details and references to primary sources.

¹²⁸ Generally with regard to the development of the *actio legis Aquiliae* in Italian law see Wesenberg and Wesener, *Privatrechtsgeschichte*, 52; Kaufmann, *Actio Legis Aquiliae*, 19 and 22; Lange, *Schadensersatz und Privatstrafe*, 10-13; Kiefer, *Aquilische Haftung*, 29-36; De Wet, *Liability for Wrongful Conduct*, 169-178.

actionable. The *actio legis Aquiliae* retained some penal consequences, notably *litiscrescence*. Further, the action was passively non transmissible.¹²⁹

The Glossators and their successors also accepted the group of quasi-delicts as an autonomous category within the scheme of obligations.¹³⁰ From the sources we can gather that they were at pains to explain the underlying denominator of the various quasi-delicts and their relation to other grounds of civil liability, an aspect that increasingly irritated jurists. As said elsewhere in this thesis, the subjective element of generalised fault remained the basis not only of delictual but also of quasi-delictual liability.¹³¹ Italian jurists experienced problems similar to those that had already surfaced in Roman law in separating the group of quasi-delicts from ordinary delicts in a dogmatically satisfying manner.

Typically for this age, jurists engaged extensively in explaining the flagrant contradiction of the *Corpus Iuris* by means of isolated exegesis. Since the *Corpus Iuris Civilis* represented the highest legal authority, the so-called *ratio scripta*, the exegesis method was used to prove the coherence and ultimately the practical utility of this compilation.¹³² Hence, with regard to the distinction between delicts and quasi-delicts, the jurists did not focus on generalised answers or models. In their casuistic approach, the main attention was given merely to one aspect: the distinction between judges' and doctors' liability.¹³³ The jurists of the time asked themselves whether or not there existed a dogmatically satisfying explanation for the fact that a doctor who operated unskilfully or negligently was liable under the *lex Aquilia* whereas a negligent judge's liability was based merely on quasi-delict. In spite of a number of explanations for this lack of consistency, a dogmatically satisfying penetration of the complex relation of delict and quasi-delict was not achieved. Not once, as the following overview shows, was the group of

¹²⁹ Wesenberg and Wesener, *Privatrechtsgeschichte*, 52-53; Kaufmann, *Actio Legis Aquiliae*, 21-22; De Wet, *Liability for Wrongful Conduct*, 172; Kiefer, *Aquilische Haftung*, 32; Lange, *Schadensersatz und Privatstrafe*, 153. With regard to delictual liability the Italian jurists were determined to grant not only the *interesse circa rem* (for direct damages to a thing) but also the *interesse extra rem* which covered all indirect damages. See below at 3 6 1 for details.

¹³⁰ Hochstein, *Obligationes Quasi ex Delicto*, 37.

¹³¹ See chapter II 2 3 1 1 at fn199 and this chapter text before fn119.

¹³² Stein, *Römisches in Europa*, 80-82; Hahlo and Kahn, *Legal System*, 489-492; Van Caenegem, *Historical Introduction*, 48-49.

¹³³ Giuliani and Picardi, *Responsabilità*, 24-25; Hochstein, *Obligationes Quasi ex Delicto*, 35 and 38.

quasi-delicts defined for what it really was, namely a conglomeration of (objectively based) instances of strict liability.¹³⁴

Obviously, a differentiation of delicts from quasi-delicts or, casuistically, between the liability of judges and doctors, could hardly be based on the fault requirement, since in both instances liability was based upon negligence. Consequently, the jurists of the time engaged in finding alternative criteria. Whereas the Gloss confined itself to a mere comment that liability was: “*speciale in iudice, aliud in aquilia*”¹³⁵; Bassianus argued that a difference arose between the two in that loss caused merely by words, as in the case of a judge was less serious than when caused by a person’s act, as in the case of a doctor.¹³⁶ Bassianus’s pupil, Azo, proposed that a judge’s simple decision was not yet a *maleficium*. However, a doctor’s simple *secare* sufficed to commit a delict. Only *male iudicare* could bring about a judge’s liability.¹³⁷ Hence, the former amounted to a true delict and the latter was classified as a quasi-delict.

Bartolus, who also accepted the fault requirement as the general basis of both quasi-delictual and delictual liability, attempted a differentiation on another ground, namely the judge’s obligation to give judgement by virtue of his public office (*necessitas muneris*), an obligation which did not rest on a doctor’s shoulders. A doctor may always refuse to treat a patient.¹³⁸ Bartolus’s view was shared by Angelus de Ubaldis¹³⁹, as well as by Alciati who refers to the

¹³⁴ See above at chapter II 2 3 1 and 2 3 1 2.

¹³⁵ Gloss ‘Pecasse’ D. de actionibus et oblig. 44.7.4: “...quare ergo non ex maleficio tenetur, ut in aquilia? Respondeo speciale in iudice: aliud in aquilia.”

¹³⁶ Quoted at Giuliani and Picardi, *Responsabilità*, 24 fn4: “...quia plus est damnum dare corpore in corpus quam verbis solummodo.”

¹³⁷ Azo, *Aurea Summa*, Inst.IV de obligationibus quae ex quasi delicto nascuntur, n.14: “Sed certe iudicare non assignatur inter genera maleficiorum nisi fiat dolo: imo potius deberet assignari inter genera beneficiorum. Secare autem, vel scindere, vel rem deteriore constitutere vel dare actionem his faciendis, per culpam, vel imperitiam, inter maleficia sine dubio reputatur unde aliud est in illis quam in iudice.” Azo’s view, however, was not uncontended, as is evident from De Bellapertica’s *Institutionum*, IV *De obligationibus quae ex quasi delicto nascuntur*, nn1-2 who considered the judge who misjudged due to *imperitia* committing a genuine delict as much as the doctor.

¹³⁸ *Commentaria*, tom.VI, Digestum novum, de act. et obl. 4 ‘si iudex’ n.1: “Dic, quod officium iudicis est necessarium, quia ex necessitate tenetur, in Aquilia voluntarie fit.” The Commentary on the Institutes of Bartolus which frequently is quoted in this regard (see *inter alia* Hochstein, *Obligationes Quasi ex Delicto*, 42 fn65) has not been written by Bartolus but by the French jurist Jacques de Révigny. See for details Weimar, *TR* 35 (1967) 284 and 285 fn8 and Lange, *Schadensersatz und Privatstrafe*, 126 fn80 with further reference to von Savigny, *System*, 127. De Puteo, *De Syndicatu*, 560 affirmed that: “Iudicare est munus publicum.”

¹³⁹ *Commentaria*, D.44.7.5.4 ‘si iudex’ n.5: “...dic quod medicus semper agit ex salute hominis, sed iudex non, et ideo medicum cautiorem esse oportet propter maius periculum.”

distinction between the liability of the doctor who merely *ex voluntate suscepit officium* and the judge *qui ex necessitate agit*.¹⁴⁰

In the last analysis, however, these concepts appear to be motivated purely by legal-political and not dogmatic considerations. Consequently, we do not gain any fundamentally new views with respect to a different dogmatic interpretation of the two categories. In much the same fashion, the Italian jurist Placentinus does not propose a different dogmatic approach at all and adheres to the fault criterion as advanced by the *ratio scripta*. However, the aspect that makes Placentinus's approach a quite remarkable step is that he appears to be the first author who further subdivides the category of quasi-delicts. Accordingly, we are asked to differentiate between the liability of a judge who adjudicates wrongly *per imprudentiam* and the instances of quasi-delicts where someone *aliquatenus culpa reus est, ex eo quod alius vere delinquit*.¹⁴¹ Placentinus's theory thus indicated an aspect which became decisive in the future development of the category of quasi-delict which, ultimately, was not considered to contain a uniform ground for liability but to represent a hotch potch of varying situations.

From Placentinus's view, the future could already be predicted: in the context of the uncritical acceptance of a generalised fault requirement as the basis of quasi-delictual liability during this and all later epochs of legal history, and in the context of the gradual and irresistible expansion of the *actio legis Aquiliae* as a generalised delictual action *per se*, the views of Placentinus and those jurists who followed in his footsteps inevitably diminished any remaining scruples in removing single elements from the category of quasi-delicts.¹⁴² They led to a dispersal and to a gradual dissolution of the category and to an amalgamation with delicts in a narrow sense. This development represents exactly the position of the modern South African law of delict, where quasi-delictual liability is hardly discussed any longer.¹⁴³ In the

¹⁴⁰ *Opera*, tom.I pars.IV tit.V de liberis et posthumis L.XXIX.3.

¹⁴¹ *Institutionum*, 4.5 pr: "*Quasi delinquere quis dicitur duobus modis...*".

¹⁴² For instance Donellus, Grotius, Van Leeuwen, Groenewegen, Voet. See below text at chapter V 3 text at fnn 155-157 for details.

¹⁴³ Undoubtedly judicial liability has been fused with delicts based on fault. Other quasi-delictual actions such as the *actio de effusis vel deiectis* and the *actio positi vel suspensi* have survived within the frame of South African law of strict liability. However, they appear not to have flourished. A recent critic has termed them anachronisms. See Wille's *Principles of South African Law*, 703. Further, on the South African *usus hodiernus* of quasi-delictual liability see Pauw, *THR-HR* 42 (1979), 251; Midgley, *Delict*, 22; Zimmermann, *Law of Obligations*, 20 and 1126-1130 at fnn 233 and 254; *Effusum vel Deiectum*, 321 and below chapter VII 2.

days of the Glossators and Commentators, meanwhile, quasi-delicts were not yet actionable under the *actio legis Aquiliae*. The *actio in factum* generally was believed to be the appropriate action.¹⁴⁴

Finally, if we investigate the development of *iniuria* and the *actio iniuriarum* as another means by which judicial officers were held liable, similar to Aquilian and quasi-delictual liability, the Glossators and Commentators accepted the state of Justinian's law of injuries as the basis for their own approach.¹⁴⁵ In the writings of the Italian jurists the *actio iniuriarum* had already begun to show some resemblance to the modern South African law of injury. This is particularly true with respect to the emergence of *animus iniuriandi*.¹⁴⁶ As in the development of Aquilian liability, subjective elements now came fully to the fore. With regard to the essential elements of *iniuria*, the latter term was retained as a common denominator and *contumelia* was considered to be the essence of *iniuria*. This notwithstanding, other meanings of *iniuria*, particularly in the sense of inequity and injustice, remained relevant. The latter two meanings were especially important in judicial liability. The classical division of *iniuria* into verbal and real impairments came to be supplemented by injuries in writing (*iniuria literis*).¹⁴⁷ The generalised fault requirement with regard to the *actio iniuriarum* was interpreted to mean that liability could only be imposed on a culprit who had been actuated by *dolus*.¹⁴⁸ Henceforward, the gist of the *actio iniuriarum* became *animus iniuriandi*.

Glossators and Commentators agreed that the *actio iniuriarum* retained its character as a private penal action. Like other *actiones poenales*, therefore, it was passively and actively intransmissible.¹⁴⁹ The action had to be brought within one year.¹⁵⁰ With respect to judicial liability, the *actio iniuriarum*'s private penal character is further evident in that the *actio iniuriarum* was essentially considered a subsidiary action available to the prejudiced party

¹⁴⁴ Gloss 'Discriminis' C. de poena jud. 7.49.2: "*Si autem sine dolo hoc est per imprudentiam, tunc teneatur actione in factum...*". Note also Gloss 'Litem Suam' Inst. 4.5 pr.

¹⁴⁵ Walter, *Actio Iniuriarum*, 60; Burchell, *Law of Defamation*, 8-9.

¹⁴⁶ Burchell, *Law of Defamation*, 9.

¹⁴⁷ Pauw, *Persoonlikheidskrenking*, 35-36: "...dat dit [*animus iniuriandi*] 'n subjektiewe element inhou en dat die dader op een of andere wyse moes gewil het dat die benadeelde leed opdoen...anders as in de *Corpus Iuris*, *animus iniuriandi* gelykgestel is aan *dolus*."; Ranchod, *Foundations*, 32-33; Walter, *Actio Iniuriarum*, 61.

¹⁴⁸ Pauw, *Persoonlikheidskrenking*, 37; Walter, *Actio Iniuriarum*, 61.

¹⁴⁹ *ibid.* 62-63.

¹⁵⁰ *ibid.* 63.

alongside other criminal actions, of which one has to distinguish two: first, actions based on ordinary crimes (*crimen ordinaria*) such as battery, culpable homicide, false imprisonment; second those based on special crimes of office, although these may not be compared too broadly with the somewhat modern category of crimes committed by public officials. In those early days, in the laying of a criminal charge against a judge, it was more appropriate to speak of certain crimes that emanated more than others from the public sphere and, hence, received primary attention. Reference here can be to instances where a litigant suffered prejudice from wrong judgement (*falsum*) or from extortion (*crimen repetundarum*).¹⁵¹

3 JUDICIAL LIABILITY FOR WRONG JUDGEMENTS

In light of the fundamental influence of post-classical Roman (Justinian) law on the development of Italian law from the eleventh century onwards, it is not surprising that the legal principles of judicial liability for misjudgements were derived to a considerable extent from Roman law. Only to a very small degree were these regulations complemented by the cities' statutory laws. On the other hand, it is essential to note that the necessary organisational and procedural basis for judicial liability was revamped in its entirety at that stage. In this respect, therefore, comparisons with Roman law may be made only cautiously.¹⁵²

3.1 Liability for *dolo malo* misjudgements

In high medieval Italian law, judges were held liable for *dolo malo* misjudgements.¹⁵³ This dogma arose for two main reasons: At first, the dominant influence of the *Corpus Iuris Civilis*

¹⁵¹ Engelmann, *Wiedergeburt*, 435-436.

¹⁵² Genzmer, *ZSS (RA)* 61 (1941), 335.

¹⁵³ De Puteo, *De Syndicatu*, 613 n.24 makes the general statement that: "*Officiales habentes administrationem rerum publicarum, tenetur de dolo, lata et levi culpa*"; Angelis de Perusio, *De Syndicatu*, n.6 and n.10; Baldus de Perusio, *Tractatus Singularis in Materia Syndicatus*, n.13; Cataldini, *Tractatus in Materia Syndicatus*, n.158; De Bellapertica, *Institutionum*, IV *De obligationibus quae ex quasi delicto nascuntur*, n.3; Alciati, *Opera*, tom.III pars.I lib.II de pactis L.XXIX.73; Azo, *Aurea Summa*, Inst.IV *de obligationibus quae ex quasi delicto nascuntur*, n.1; *Gloss 'Tenetur' D. de judiciis*, 5.1.15. See also Hochstein, *Obligationes Quasi ex Delicto*, 44-45; Engelmann, *Wiedergeburt*, 354-361.

on the development of Italian law took full effect. Accordingly, the passage in *D* 5.1.15.1 became the point of departure for the Italian doctrine of judicial liability for *dolus*:

“Iudex tunc litem suam facere intellegitur, cum dolo malo in fraudem legis sententiam dixerit. Dolo malo autem hoc facere videtur, si evidens arguatur eius vel gratia vel inimicitia vel etiam sordes: ut veram aestimationem litis praestare cogatur.”

The jurists’ firm trust in the authority of the *Corpus Iuris Civilis* made it unlikely that they would call into doubt the position of post-classical Justinian Roman law. Contemporary discussion as to the variable position of judicial liability in pre-classical, classical or post-classical Roman law, which has gained much inspiration from, *inter alia*, research on interpolations and discoveries such as the *lex Irnitana*, was absolutely foreign to the Italian jurists of those days.¹⁵⁴ Secondly, acceptance of a generalised fault requirement as the basis of all delictual liability made liability for *dolus* a matter of fact.

As said above, Italian jurists considered an act committed *dolo* as wilful misconduct in full consciousness of its unlawfulness.¹⁵⁵ Even though wrongfulness did not appear as the sole element, no doubt existed as to its being an essential prerequisite for delictual liability.¹⁵⁶ Accordingly, Italian doctrine accepted judicial liability for *dolus* as liability for any disadvantageous (detrimental) judicial conduct committed wilfully and consciously. Liability for *dolus* as the gravest form of culpability was understood as the counterpoint to judicial liability for *culpa*.¹⁵⁷ What, then, was considered disadvantageous (detrimental) judicial conduct in those days?

Jurists considered as such any *dolo malo* misjudgement or other infringement of the interests of the parties committed to the judge’s care that were due to the judge’s violation of his judicial duties.¹⁵⁸ Violation of judicial duties came to include lack of the required and expected legal expertise as well as lack of perception. It also included the judge’s lack of experience, despite his affirmation to the contrary at the time of his employment in the narrow

¹⁵⁴ See above at chapter II 1 3 and 2 2 1.

¹⁵⁵ See above at 2.

¹⁵⁶ Kaufmann, *Actio Legis Aquiliae*, 20: “Rechtswidrigkeit und vorallem das Verschulden waren bereits im *Corpus juris* bis zu einem hohen Grad entwickelt worden.” Engelmann, *Schuldlehre*, 41-49; Zimmermann, *Law of Obligations*, 1007 (Roman law), 1028 (*usus modernus*).

¹⁵⁷ Engelmann, *Wiedergeburt*, 354; Giuliani and Picardi, *Responsabilità*, 30-31.

¹⁵⁸ Baldus de Perusio in his *Tractatus Singularis in Materia Syndicatus* provides for a useful overview at n.4, n.10 and n.13. Further note Angelis de Perusio, *De Syndicatu*, n.6 and n.7 (with exceptions).

sense), and, moreover, any neglect of conscientious and painstaking exercise of judicial office.¹⁵⁹

Once violation of duty had been established, usually through a wrong judgement that had occurred in consequence, it was open to the judge to plead any of the accepted justification grounds. Of all the generally accepted justification grounds, such as *vis* and *metus*, youth, mental disorder, and mistake (*error*), the latter is of particular interest here.¹⁶⁰ According to the Italian doctrine, liability for *dolus* was ruled out where the essential requirement for responsible conduct, namely the individual's unhampered expression of will, was lacking due to ignorance or mistake. Generally, fault could result only from conduct that was free from mistake. Since consciousness of unlawfulness was considered an essential aspect of liability for *dolo malo* wrong judgements, any mistake as to the element of unlawfulness obviously had serious consequences with regard to liability.¹⁶¹ For the relevance of this mistake to consciousness of unlawfulness, it was immaterial in practice whether the mistake was as to facts (*error facti*), as to law (*error iuris*) or was due to mere ignorance of law (*ignorantia iuris*). This is affirmed by the Gloss which stated the general rule as follows: “...quaelibet ignorantia etiam iuris excusat a dolo.”¹⁶² For obvious reasons a judge who pleaded mistake usually relied on either *error* or *ignorantia iuris*. But were *error* and *ignorantia iuris* regarded as excusable, or – to refer to the well-known maxim – did *error* or *ignorantia iuris non nocet*?¹⁶³

In the light of the ever-growing expectations of judicial expertise described above, an excuse for wrong decisions, particularly with reference to *error iuris* or *ignorantia* was likely to be met with incredulity. It is at this crucial point that Italian jurists applied the concept of *dolus*

¹⁵⁹ Examples are provided by De Puteo, *De Syndicatu*, 378 *et seqq.* nn. 1-4, 385 *et seqq.* nn.4-5; Engelmann, *Wiedergeburt*, 355 and 364. It must be remembered that compliance with these duties, as well as legal expertise, perception and experience was guaranteed by the judge's formal oath of office and contract of service.

¹⁶⁰ For an useful overview on deficiencies in the fault element see Engelmann, *Schuldlehre*, 23-33.

¹⁶¹ Engelmann, *Schuldlehre*, 41-48, *Irrtum und Schuld*, 250-255 and 267 *et seq.* and 304-315, further *Wiedergeburt*, 356-357.

¹⁶² Gloss ‘Iusta ducti’ C. ad leg. Fla.de plagiaris 9.20.14. Mayer-Maly, *Rechtsirrtum*, 302 defines both elements as follows: *Error iuris* is the existence of a misconception as to the legal position, *ignorantia iuris* on the other hand indicates the lack of conception.

¹⁶³ For an overview see generally Zimmermann, *Law of Obligations*, 604-609 (with respect to contractual theory), also Zimmermann and Hellwege, ‘*Error iuris non excusat*’ und das ‘*law of restitution*’, 1367-1371; Mayer-Maly, *Rechtsirrtum*, 303-304 and *Error iuris*, 147-169 (mainly on Roman law).

praesumptus. There operated no *praesumptio iuris* or even a *praesumptio iuris et de iure* against judges by which they were considered always to be in command of legal expertise.¹⁶⁴ Hence, it was generally open, even to judges, to plead mistake as to law. This notwithstanding, a simple *praesumptio iudicis* came into operation. Accordingly, in an action against a judge it was up to the deciding court to presume *dolus* where circumstantial evidence indicated very strongly against the judge's not having legal knowledge in spite of his contention to the contrary. To state the matter correctly, it was not *dolus* that was presumed but legal knowledge.¹⁶⁵

It is not surprising that such a presumption of legal knowledge was not easily accepted. On the contrary, careful differentiation was absolutely essential. A distinction was made, firstly, according to the legal expertise that was required for the judicial office the defending judge occupied when he gave the wrong judgement and, secondly, according to the judge's actual legal education. Here comes into play the difference discussed earlier, namely that between judges who were merely legally trained and those who were truly legal scholars, that is *doctores*. Certainly the degree of legal expertise expected from a *doctor iuris* was considerably different from that expected of an ordinary trained judge. Ordinary judges were expected to be acquainted with the generally accepted principles of law and the basics of legal theory, in as far as these were part of the universities' four- to five-year legal curriculum. *Doctores* who acted as judges were expected to have additional knowledge of the sources of the *ius commune*, of local statutory law and the Gloss, as well as of the various distinctions of the *communis opinio* and the rules of legal interpretation.¹⁶⁶

Generally, these specific presumptions of legal expertise were held against judges' claims of *error iuris* or *ignorantia*. Especially gross contraventions and mistakes as to the proper application of the law generally led to a *praesumptio iudicis* of legal knowledge and, consequently, to a presumption that the judge had misjudged with *dolus*. It must be stressed,

¹⁶⁴ Engelmann, *Wiedergeburt*, 357, *Irrtum und Schuld*, 58-59.

¹⁶⁵ Reference should be again to the text after fn127 above, where it was indicated that a specific type of *dolus praesumptus* operated in cases of mistake as to law. Whether or not *error iuris* was at issue, according to Mayer-Maly, *Rechtsirrtum*, 303 depended largely on both the burden of proof and the rebuttal of presumptions: "Durch die strikten Beweisregeln des römisch-kanonischen Prozesses wird auch der Rechtsirrtum zu einer Frage der Beweislastverteilung und der Vermutung."

¹⁶⁶ Engelmann, *Wiedergeburt*, 358-359 and above at 14.

however, that it was always open to a judge to rebut this presumption.¹⁶⁷ It was then up to the judge to substantiate the claim that his misjudgement was due to carelessness or laxity and not *dolus*.

It speaks volumes for the prestige and reputation of the judicial office, as well as the high esteem in which bearers of this office were generally held, that it was argued by some jurists that a *dolo* misjudgement was hardly to be expected; the presumption, rather, lay in *bona fides* and conscientiousness on the part of the judge: "*In dubio iudex, qui male iudicavit, praesumitur fecisse per ignorantiam et non per dolum...*".¹⁶⁸ And Alciati stated:

"Praesumitur pro iudice, sit est bonus et recte faciat ea, quae officio suo incumbunt...Et facit, quia ad illud officium ut plurimum eliguntur literati et honesti viri, unde merito pro eis praesumitur...".¹⁶⁹

To be provocative one might say that this 'counter' presumption balanced the effect of the initial *praesumptio iudicis*. This does not mean that in practice there existed hardly any cases of judicial liability for *dolus praesumptus*. In fact, in most cases, great reluctance to rebut the initial *praesumptio iudicis*, awkwardness, scruples and professional conceit probably prevailed, particularly on the part of the *doctores*. If, therefore, a judge was not willing to plead embarrassingly negligent or careless conduct of office in rebuttal, he had to bear the consequences of liability for *dolus praesumptus*. In civil law, unlike criminal law, unrebutted *dolus praesumptus* gave rise to full liability *ex delicto* for *dolus verus*.¹⁷⁰ In this regard, the *actio legis Aquiliae* certainly appears to have been the appropriate action.¹⁷¹

This admittedly schematic approach reveals: Whatever the judge chose to do, either to rebut the presumption of legal knowledge or to resist this very embarrassing solution, he loaded liability on himself, i.e., liability for *dolus* or liability for *imprudencia*.¹⁷² Thus we can say that in Italian *ius commune* in one way or the other a hard line was taken on a judge pleading

¹⁶⁷ Engelmann, *Irrtum und Schuld*, 74-76, *Wiedergeburt*, 359-360.

¹⁶⁸ Amodeus, *De Syndicatu*, n.128, note also his observations in his *Tractatus Syndicatus* at n.114. Affirmed by Dulceti, *De Syndicatu*, n.25 and De Puteo, *De Syndicatu*, 501 n.14.

¹⁶⁹ *De Praesumptionibus*, Reg.III. praes.9 n.1. Note further De Puteo, *De Syndicatu*, 533 n.10: "*Iudex qui male iudicavit, in dubio praesumitur per ignorantiam iudicasse.*"

¹⁷⁰ Engelmann, *Irrtum und Schuld*, 76-77 and *Wiedergeburt*, 360-361.

¹⁷¹ Pauw, *THR-HR* 42 (1979), 247; Engelmann, *Wiedergeburt*, 344 and 354; Schrage, *Legal History* 17 (1996), 104; Hochstein, *Obligationes Quasi ex Delicto*, 38.

¹⁷² Mayer-Maly, *Rechtsirrtum*, 303 with reference to Engelmann.

mistake: *error* or *ignorantia iuris nocet*. This result again appears to be sound in light of the general position that has developed since the days of classical Roman law, namely that only where the law was not easily determinable for a layman a mistake of law was possibly regarded as excusable.¹⁷³ From what has been said earlier it is evident that Italian judges from the second half of the thirteenth century onwards had left that sphere of lay knowledge far behind them.

3.2 Liability for *imprudentia*

The liability of judges for *imprudentia* was of exceptional practical relevance in the Italian law of judicial liability of the thirteenth to sixteenth centuries.¹⁷⁴ In this field of law, too, Justinian's late Roman heritage continued to live on since quasi-delictual liability, under which judges' liability continued to be classified, was dogmatically based firmly upon fault.¹⁷⁵

The state of judicial liability for *imprudentia* or *imprudentia* under the fault requirement is obvious from the application of the sentence *imprudentia culpe adnumeratur* as it derives from the Gloss.¹⁷⁶ The general assimilation of *imprudentia/imprudentia* with *culpa* or, rather, with the lightest form of *culpa*, namely *culpa levissima*, results from the medieval doctrine's general exclusion of liability for mere accident (*casus fortuitus*): "...fuit casus fortuitus, et sic non

¹⁷³ Zimmermann, *Law of Obligations*, 605. For the development in the *ius commune* see 608 *et seq*; Mayer-Maly, *Rechtsirrtum*, 302. In his contribution *Error Iuris*, 168 Mayer-Maly termed this tendency of Roman law to discriminate increasingly against *error iuris* an 'Ansatz zur Härte'.

¹⁷⁴ See above at 1.3.1 and 1.3.2 and below at 5. See also Engelmann, *Wiedergeburt*, 362: "Diese Haftung allein hat der richterlichen Verantwortlichkeit in Italien seit dem 13. Jahrhundert die große Bedeutung für die Rechtspflege und Rechtsentwicklung gegeben. Ohne sie hätte der Syndikatsprozeß seinen Zweck eine rechtmäßige Politik tatsächlich zu sichern nicht in dem Maße erreichen...können."

¹⁷⁵ Liability for *imprudentia* was based upon *Inst* 4.5 pr; *D* 44.7.4 (in Roman law *D* 44.7.5) and *D* 50.13.6. See above chapter II 2.2.1 and 2.3.1. Note Gloss 'Litem Suam' *Inst*. 4.5 pr; De Rosate, *Digesti Novi*, De variis & extraordinariis cognitionibus L.V; De Puteo, *De Syndicatu*, 533 n.7: "Iudex qui iudicavit per imperitiam, tenetur in quantum bono viro videbitur aequum, scilicet in quantum facere potest." Note further 609 n.15; Amodeus, *Tractatus Syndicatus*, n.122: "Si autem per imperitiam tulerunt iniquam sententiam contra casum legis vel statuti, tenentur...". Further see Alciati, *Opera*, tom.III pars.I lib.II de pactis L.XXIX.74; Azo, *Aurea Summa*, *Inst*.IV de obligationibus que ex quasi delicto nascuntur, n.1; A de Ubaldis, *Digesti Novi*, de actionibus et obligationibus 'si iudex' n.1.

¹⁷⁶ Gloss 'Pecasse' *D*.44.7.4: "...alias deliquisse. Vere peccavit: quia imperitia culpe annumeratur." See also Engelmann, *Wiedergeburt*, 381; Hochstein, *Obligaciones Quasi ex Delicto*, 38; Schrage, *Legal History* 17 (1996), 104.

tenetur..."¹⁷⁷ Consequently, in cases of carelessness due to *imperitia/imprudentia*, it was exclusively *culpa* on the part of the *iudex* that applied, because "...*inter levissimam culpam, et casum fortuitum, nihil est medium*".¹⁷⁸

Italian doctrine provides us with considerably more certainty than Roman law as to the circumstances which resulted in judicial liability for *imprudentia*.

"Primum exemplum est de iudice, qui cognoscens inter me et adversarium meum per suam imprudentiam vel imperitiam contra iustitiam meam pronunciavit credens aequum de me facere. Iste enim iudex dicitur litem facere suam, hoc est damnum alterius in se transferre. In id etiam mihi tenetur, in quo per imperitiam suam me laesit."¹⁷⁹

Essentially, this breach of duty implied inappropriate treatment, deliberation and decision of cases by a judge. The same reasons for this breach of duty must be considered as those described above, namely lack of required and expected legal expertise (frequently referred to as *ignorantia*), as well as lack of perception (*error* in the narrow sense), lack of experience, and neglect of conscientious and painstaking exercise of judicial office. The only distinction now was that not particularly blatant or *dolo* conduct but a negligent breach of duty that led to a misjudgement was considered sufficient for liability.¹⁸⁰ In particular, liability for *imprudentia* already arose where a judge, for the above-mentioned reasons, overlooked relevant passages of the *Corpus Iuris Civilis* or the local statutes. Furthermore where he adjudicated in flagrant contradiction to legal principles laid down in the Gloss or, later, by the *communis opinio* (*opiniones ita forte*).¹⁸¹ Consequently it was stated: "...*iudex iudicans contra communem opinionem facit litem suam...*".¹⁸²

¹⁷⁷ Hochstein, *Obligationes Quasi ex Delicto*, 38 fn35 and 35 fn11 and Engelmann, *Schuldlehre*, 207-210.

¹⁷⁸ Quoted at Hochstein, *Obligationes Quasi ex Delicto*, 35 fn11; Hoffmann, *Fahrlässigkeit*, 36; Engelmann, *Wiedergeburt*, 361 and 368-369.

¹⁷⁹ By Accursius, quoted as in Engelmann, *Wiedergeburt*, 365.

¹⁸⁰ Engelmann, *Wiedergeburt*, 364. See also the overview provided for by Cataldini, *Tractatus in Materia Syndicatus*, nn.33-35, n.38 and n.49.

¹⁸¹ De Puteo, *De Syndicatu*, 552 n.2.

¹⁸² Aretinus, *Institutionum*, de obligationibus quae ex quasi delicto nascuntur 'si iudex' n.4. See also De Puteo, *De Syndicatu*, 552 n.2: "Et iudex excusatur in syndicatu, si est secutus opin. alicuius doctoris, vel glossatoris, licet faciat iniustitiam." Note Amodeus, *Tractatus Syndicatus*, n.122: "Et idem si iudicat contra communem opinionem per Doctores communiter approbatam quia est in culpa." Amodeus also refers to Bartolus and states that: "...ubi dixit, quod licet iudex sequatur opinionem, quam multi Doctores tenent, si est mala, tamen tenetur in syndicatu." Further see Schrage, *Legal History* 17 (1996), 105; Dolezalek, *Stare Decisis*, 14.

If a judge deviated from the general opinion, he had to explain convincingly that the prevailing opinion resulted in inequitable consequences or that the common opinion's interpretation of the legal sources was wrongly based. Generally it was not considered sufficient for a judge to defend himself merely by reference to the state of Roman law. The *communis opinio* could not be criticised only on the basis of Roman law, which, particularly from the age of the Commentators, was considered as the basis of the prevailing doctrine but no longer its essence. On the other hand, a judge was considered free from liability where he had to decide in areas of the law which were considered controversial by legal scholars themselves and where he based his judgement on the opinion of those scholars with the greatest renown (*magis communis opinio*). If this was not possible, the judge was free to adopt his personal view.¹⁸³ In view of all that has been said above, it appears that, to evade personal liability, judges were best advised to follow slavishly the authority of the *Corpus Iuris*, the relevant statutes and the Gloss, later the *communis opinio*.¹⁸⁴

At this stage, it is possible to take a closer look at the characteristics of the liability of Italian medieval judges. As we have seen, judicial liability arose from a breach of duty. The judge's obligation of faithful exercise of office (*fides officii*) was based on the oath of office as well as the contract the judges signed with the cities. The latter, in particular, made judicial liability appear like a kind of liability for private professional mistakes. The judge on signing the contract agreed to administer justice in a proper manner. Furthermore, he assured the other party (the city) of his legal qualifications, experience and expertise. Once he misapplied the law, he committed a breach of contract like any other professional who had undertaken a specific task. Seen from this angle, judicial liability leaves the public sphere and becomes an ordinary kind of professional liability, not much different from the liability of doctors, lawyers or artisans.

This, however, is to overlook one aspect. To characterise judicial liability as a form of liability for professional mistakes on the basis of private contract is to ignore the parties that suffered damage from the judicial wrong. Having never contracted with the judge prior to judgement, they did not have any legal rights derived from such a contract. Hence, judicial liability as a form of private professional liability applied only with regard to the legal relations between

¹⁸³ *Ibid.* 14; Engelmann, *Wiedergeburt*, 395.

¹⁸⁴ De Puteo, *De Syndicatu*, 552 n.1 and 2; Amodeus, *Tractatus Syndicatus*, n.122-123.

the judge and the city. From this it follows that judicial liability, regardless of its strong private law connotations, was most likely characterised by the oath of office, whereby the judge pledged to fulfil his duties to the city *and* to the people. Apart from the identical promises made under the contract, the judge swore submission to the syndication process at the end of his term of office. It was this process of syndication essentially that provided the various (private) parties that might have suffered from a wrong decision of the judge with the opportunity to sue the judge for damages. In consequence, one may continue to characterise medieval judicial liability as a form of personal civil liability within public service or employment.¹⁸⁵

From what has been said so far, it is clear that Italian judges were liable for any kind of *culpa*. For legal and political reasons, it was still foreign to the jurists of those days to consider any limitation of judicial liability. Unlike, for example, the Roman-Dutch jurists of later centuries, they had not a single thought of restricting liability of judges to *dolus* or *culpa lata*. Any such restriction would have been contrary to the legal political background of judicial liability: rigorous liability of judges for *dolus* and any kind of *culpa* was considered the *conditio sine qua non* of the apolitical, independent, impartial and effective public administration of justice within the communes.¹⁸⁶

As in the case of liability for *dolus*, an error as to law generally excluded fault and, correspondingly, liability for *imprudencia*: any judge who, due to carelessness, gave judgement on the basis of a mistake or from ignorance of the actual legal duties of his office at least in theory was considered to be limited in the exercise of his free will and was consequently excused.¹⁸⁷

On what line of reasoning could the need for the widest possible liability of judges be balanced with the doctrine of mistake? Needless to say, the doctrine of *dolus praesumptus* did not apply to liability for *culpa*. It seems that it was the jurist Dinus who showed the way by means of an ingenious evasion.¹⁸⁸

¹⁸⁵ Engelmann, *Wiedergeburt*, 364 and 369.

¹⁸⁶ *Ibid.* at 369-370 and see also fn5 at 370.

¹⁸⁷ See generally the detailed analysis in Engelmann, *Irrtum und Schuld*, 47-52 and 132-137.

¹⁸⁸ For the following see Hochstein, *Obligationes Quasi ex Delicto*, 38-39; Engelmann, *Wiedergeburt*, 372-377.

*“Si quis asserit se iurisperitum, cum canonici et civilis sit iuris ignarus, et praetextu assertionis fuerit assumptus in iudicem et per imperitiam iudicavit, videtur fuisse in culpa, quia se immiscuit rei ad se non pertinenti.”*¹⁸⁹

Dinus was the first jurist to construe the judge's fault as simply a kind of indirect culpability. Fault was considered to exist indirectly where the judge rendered a wrong judgement for reasons that lay in his personal condition, i.e., lack of legal experience and expertise.¹⁹⁰ In such cases, it was the judge who had created the situation in which he had given the wrong judgement. He had either carelessly assumed office against his better knowledge or irresponsibly pretended to legal expertise when he had none. The Italian jurists transformed a dogmatic concept into a basis for judicial liability, a concept one might specify in modern terms as a form of assumptive culpability. The breach of duty was simply advanced to an earlier stage. It was not the judicial decision as such that was considered the exclusive reason for liability but the decision of the judge to accept office despite lack of legal expertise and experience.

Finally, along with the above-mentioned improvement in theoretical and practical legal education, the demands on the judiciary rose steadily and were linked with the requirements for liability for *imprudencia*. As with liability for *dolus*, varying degrees of legal training and expertise played a role in the establishment of liability. The Italian jurists provided an attractive solution through the relatively flexible structure of awarding damages. Generally, the scope of damages was settled according to the actual damage that occurred. As indicated elsewhere in this thesis, however, the exact scope of damages for judicial liability under the scope of the quasi-delicts remained a discretionary decision left to the second judge.¹⁹¹ It was up to him to determine the scope of damages according to the circumstances: whether those of a judge who was merely trained legally or of a legal scholar who was a judge. Hence, the system of awarding damages left a rather flexible tool in the hands of the judge.

¹⁸⁹ Quoted at Hochstein, *Obligaciones Quasi ex Delicto*, 39 fn42; see also Engelmann, *Wiedergeburt*, 375.

¹⁹⁰ For more detail with regard to the slightly different dogmatical approach in cases of *negligentia*, see Engelmann, *Wiedergeburt*, 373.

¹⁹¹ See text below at 3 6 2 fn224.

3 3 Liability for omission

The principles of judicial liability for *dolus* and *imprudentia* applied also to omissions. In this regard they may be seen as exceptions to the general opinion of those days, according to which liability for omission was possible in cases of *dolus*, *culpa lata* and *culpa levis*, but not *culpa levissima*.¹⁹² Accordingly, judges were liable for the full *interesse* in cases of *dolo* omissions or for a discretionary amount in cases of *imprudentia* omissions.¹⁹³ Of particular relevance to judicial liability were those cases where judges, owing to gross or simple lack of judicial conscientiousness (*ex negligentia*), failed to deliver a correct decision.¹⁹⁴ The contrary opinion of Bartolus, according to which liability for *dolus* and *imprudentia* in cases of omissions should always be at the full *interesse*, was not generally accepted.¹⁹⁵

3 4 Special features of judicial liability according to statute law

Regulations on judicial liability that were found in the above-mentioned sources of the *ius commune* were supplemented by the statute laws of the various cities.¹⁹⁶ As long as they were not identical with the *ius commune*, the latter were generally accepted as *lex specialis*. Under the terms *contra iustitia* or *contra ius*, the statutes covered all the breaches of judicial duties.¹⁹⁷

Deviations from the *ius commune* related especially to the scope of liability. Most of the older statutes did not include any particular regulations as to the exact scope of liability. Some statutes referred generally to the obligation of the judge to pay damages (*damnum*) or damages and costs (*damnum cum expensis*). Consequently, in respect of liability for *imprudentia*, it was merely a question of interpretation whether or not the discretionary rule of the *ius commune* also applied.¹⁹⁸ Other statutes determined the full payment of damages without distinguishing between liability for *dolus* or *imprudentia*. Thus any discretionary reducing of damages in

¹⁹² Kaufmann, *Actio Legis Aquiliae*, 20.

¹⁹³ Engelmann, *Wiedergeburt*, 366-368.

¹⁹⁴ See above 3 1 text at fn159 and particularly 3 2 text at fn179-180.

¹⁹⁵ For a full account of the dispute see Engelmann, *Wiedergeburt*, 366-368.

¹⁹⁶ For the following section, extensive information once again was drawn from Engelmann, *Wiedergeburt*, 415-421.

¹⁹⁷ *Ibid.* at 415.

¹⁹⁸ *Ibid.* at 417.

cases of *imprudencia* was ruled out.¹⁹⁹ From the fourteenth century onwards, statutes increasingly provided for detailed regulation of the scope of liability. It is noteworthy that they occasionally entailed even harsher consequences for liability for *dolus* than under the *ius commune*. For instance, the statutes of Milan from 1351 regulated that a judge who had been bribed had to be sentenced to the payment of four times the amount of the full *interesse*; in cases of *dolo* misjudgements, he was obliged to pay three times that sum.²⁰⁰ The statutes of Pavia from 1393, of Parma from 1494 and of Bergamo from the early fifteenth century received the regulations from Cremona from 1387 according to which judges in cases of *dolo* misjudgements had to pay four times the value of the suit, from which half the amount went to the plaintiff. In cases of *imprudencia*, the amount of damages was determined according to the syndicate judge's discretion, that is according to the principles of the *ius commune*.²⁰¹

3.5 The relationship between judicial liability and availability of appeal procedures

Unlike the Roman jurists, Italian jurists discussed in detail the influence on the liability of judges of the possibility of appeal against a wrong decision. This aspect might be considered another instance of the Glossators and Commentators extending the position of Roman law. Furthermore, in later centuries some of the most influential arguments against rigorous liability of judges flowed from the relationship between judicial liability and appeal, as will become evident in the following chapter. In this respect later jurists utilised the early Italians' views in support of their arguments.

In the first instance, it is obvious that, regardless of any legal-political argument against judicial liability such as the protection of judicial independence and impartiality, for which, apparently, the time was not yet ripe, one of the strongest arguments is that liability is superfluous where it is far easier and less controversial to appeal against the wrong decision. Not surprisingly, this notion could develop only in the context of the emergence of a reliable and effective system of appeal. It is little wonder then that it appeared neither in pre-classical Roman nor in Germanic law. However, it was not discussed in classical or post-classical law either, although a system of appeal was at hand.

¹⁹⁹ *Ibid.* at 418.

²⁰⁰ *Ibid.* at 419.

It was the Commentators who finally raised the question when they addressed the plaintiff's responsibility for failing to overcome a wrong judgement. The question was to what extent a judge was protected by factors such as: waiver of the right to an appeal prior to or after the disputed judgement, or subsequent withdrawal of an appeal, or deliberate failure to appeal, or confirmation of the initial judgement by the appeal court.²⁰²

Generally, the *communis opinio* rejected any implied restriction of judicial liability. This view was based on the rejection in the Gloss of the notion that a party who failed to appeal against a wrong decision had only himself to blame, on the rather vague ground that the party might have had some reason for not appealing: "...quia causa subesse potuit...".²⁰³

Clarity, however, was provided by Bartolus who, with regard to the most frequent case, namely failure to appeal, made the point that the party's omission *per se* did not affect the judge's own mistake, i.e., the wrongful application of a norm. Furthermore, Bartolus argued that appeal procedures and the claim for liability were based procedurally upon two absolutely distinct matters of dispute. Finally, he argued that there was no reason to believe that failure to appeal against a decision amounted to acceptance of the content of the decision.²⁰⁴ The *communis opinio* is in agreement with Bartolus up to this point.²⁰⁵ However, the jurists did not support Bartolus's efforts to limit the scope of judicial liability²⁰⁶ particularly in cases where a higher court confirmed the initial judgement on appeal. In cases such this, Bartolus favoured a

²⁰¹ *Ibid.* at 420-421.

²⁰² For the following see especially Engelmann, *Wiedergeburt*, 397-405; further Hochstein, *Obligaciones Quasi ex Delicto*, 45-47; Padoa Schioppa, *Ricerche Sull'Appello*, vol.II 202-203.

²⁰³ Gloss 'Novi iuris' D.2.2.1.

²⁰⁴ *Commentaria*, tom.X, Consilia, Questio IX n.7, n.9 and n.17. De Puteo, *De Syndicatu*, 169 n.6: "Et licet qui non appellat, videtur consentire, est verum inter partes, non quo ad iudicem, quia non videtur confiteri, quod sententia sit iusta."

²⁰⁵ Amodeus, *De Syndicatu*, n.133: "Et praedicta intellige, quod iudex tenetur in syndicatu, sive per dolum sive per imperitiam male iudicavit, quando pars a sententia non appellavit...quod si sententia est iniqua, iudex tenetur, sive pars appellet, sive non, sive succubat in appellatione sive non, etiam condemnatus consecutus fuit interesse a dice appellationis, qui eam confirmavit quia uterque tenetur ex sua causa & suo delicto." For an overview see also De Puteo, *De Syndicatu*, 170 nn.6-9.

²⁰⁶ De Puteo, *De Syndicatu*, 170 n.9; Amodeus, *De Syndicatu*, n.134. For further references see Engelmann, *Wiedergeburt*, 399-402.

restriction of liability.²⁰⁷ Regrettably, Bartolus does not provide us with arguments for his opinion.²⁰⁸ As will become apparent in subsequent chapters Bartolus was ahead of his time and in later centuries his opinion began to make an important impact since his approach formed the basis of one of the most effective arguments for restriction of judicial liability.²⁰⁹

To return to the *communis opinio*, a valid point in law was that the possibility open to a party to mitigate his loss by appealing against a wrong decision did not *per se* oblige him to do so – in principle he had a free choice between lodging an appeal and holding the judge personally liable for a wrong decision.

3 6 Damages

As has been indicated before, the characteristic division of liability in Justinian Roman law continued to be valid in Italian doctrine, namely liability for *dolo* misjudgements as distinguished from liability for misjudgements committed with *imperitia*. This division also had an impact on the assessment of damages.

3 6 1 Damages in cases of misjudgements given *per dolus*

From the time of the Glossators there emerged a concept of assessment of damages freed of traditional Roman formal procedure. Emphasis now lay on the concept of *interesse*.²¹⁰ For centuries, Accursius's definition of *interesse* essentially remained the basis of all definitions: *interesse* was loss suffered and the profit forfeited, i.e., "*Interesse est damnum emergens et*

²⁰⁷ *Commentaria*, tom.X, Consilia, Questio IX n.20: "...aut in causa appellationis appellator succumbit, et sic sententia prima fuit confirmata, et tunc iudex non poterit conveniri, talis enim sententia excusat iudicem." Note also Cataldini's comments with regard to an appeal judgement that revealed new evidence in his *Tractatus in Materia Syndicatus*, 49: "Adde quod iudex non facit litem suam quando sententia ex novis probationibus revocatur quae sunt in causa appellationis."

²⁰⁸ See again *Commentaria*, tom.X, Consilia, Questio IX n.20.

²⁰⁹ For details see Engelmann, *Wiedergeburt*, 403-404. Also Padoa Schioppa, *Ricerche Sull'Appello*, 203 fn19; Hochstein, *Obligationes Quasi ex Delicto*, 45-46 and see below at chapter V 4 I 4.

²¹⁰ See for an excellent overview in English Erasmus, *THR-HR* 38 (1975), 112-118; further, Lange, *Schadensersatz und Privatstrafe*, 6-32 and Wieling, *Interesse und Privatstrafe*, 9-16.

lucrum cessans ex quo aliquid fieri cesset."²¹¹ With this definition, Accursius achieved two things: firstly he emphasised the principle of compensation (loss suffered).²¹² Secondly, due to its subjectivity (loss suffered by the individual), the definition ignored any objective or external limitations. Hence, the plaintiff's full loss became recoverable, including the loss of profits. Thus, Accursius's definition provided for a considerably wider and more flexible concept than the Roman *id quod interest*.²¹³

Without going into too much detail, it is essential to realise that with regard to the crucial question of what losses were recoverable by a plaintiff, *interesse* was subdivided into an *interesse circa rem* and an *interesse extra rem*.²¹⁴ The former indicated compensation for direct loss only, at the value of the thing lost; the latter denoted compensation also for consequential loss. Thus, in the law of delict, the *interesse* included consequential losses (*interesse extra rem*), i.e., the *totale interesse*.²¹⁵ With regard to judicial liability for *dolus*, therefore, the *totale interesse* or *totum* was not limited to the value in dispute, but covered all the direct and indirect losses flowing from the wrong judgement, including for instance the costs of the suit (*litis impendia*) and other incidental expenses. The *totum* hence represented the maximum compensation *ex delicto* for wrongful judicial conduct committed with *dolus*.²¹⁶

However, as in Roman law, the Italian jurists had to take cognisance of the fact that the sources did not refer generally to the *interesse* but to the *vera aestimatio lites* as the relevant

²¹¹ Gloss 'Possible est' C.7.47. Confirmed by Baldus de Ubaldis, *Consiliorum*, I.Cons.291 n.6: "...interesse est aestimatio alicuius utilitatis non habitae propter alicuius factum iniustum, vel cessationem iniustam: ex quorum doctores."

²¹² This proved to have another effect. With the emphasis on compensation, punitive aspects of liability were increasingly ignored. This development, undoubtedly, also impacted on the change in perception of the *actio legis Aquiliae* from a mixed legal action (criminal and civil) to an exclusively reipersecutory action.

²¹³ Erasmus, *THR-HR* 38 (1975), 112-113; Wieling, *Interesse und Privatstrafe*, 9 and 12; Medicus, *Id quod interest*, 302-303; Lange, *Schadensersatz und Privatstrafe*, 16-17. See also above at chapter II 2.4.

²¹⁴ This process was much more complex than can be described here. The Glossators' concept of *interesse* was already subjected to criticism by the Commentators as well as by the French *ultramontani*, who feared unlimited liability. See for details Wieling, *Interesse und Privatstrafe*, 14-23 and 37-41 and Lange, *Schadensersatz und Privatstrafe*, 24-32. Despite their criticism, the majority of authors accepted that the *interesse extra rem* was always granted in cases of delicts. In this respect the approach of Accursius to the question of damages in instances of judicial liability can be accepted as sound. See Lange, *Schadensersatz und Privatstrafe*, 27; Wieling, *Interesse und Privatstrafe*, 31, 32 and 41; Erasmus, *THR-HR* 38 (1975), 116-117.

²¹⁵ Engelmann, *Wiedergeburt*, 346 and 354; Erasmus, *THR-HR* 38 (1975), 116; Wieling, *Interesse und Privatstrafe*, 31, 41.

²¹⁶ Engelmann, *Wiedergeburt*, 354-355.

scope of liability in cases of *dolo* misjudgements.²¹⁷ The question is whether *vera aestimatio lites* was identical with the *totale interesse* or whether it denoted something different, a ‘plus’ as Professor Engelmann has suggested. To Engelmann, *veram litis aestimationem* not only incorporated the *totum* but also the entire *interesse* the party would have secured had he or she won the case, even if that amount by far exceeded the *totale interesse*.²¹⁸ On the other hand, Engelmann confesses that neither the Gloss nor the jurists deal with this aspect in great detail.²¹⁹ His sole argument derives from a comment by Bartolus, who refers to the *interesse* that reaches beyond the mere *interesse* at the time of dispute: “*Si vero agitur propter malefactum...si scienter, venit interesse extrinsecum...*”²²⁰

With respect, Professor Engelmann is, to my thinking, wrong. What to him amounts to an somewhat dubiously extended *interesse* is not essentially distinct from the *interesse extra rem*. On the contrary, Bartolus’s extrinsic *interesse* refers precisely to *interesse extra rem* which is in addition to the simple *interesse circa rem* and hence covers the *totale interesse*.²²¹ The fact that no comment on the exact scope of the *aestimatio lites* can be deduced from the works of the jurists is strong support for the argument that no specially extended liability applied to the *dolo* acting judge. This view is in accord with that of the majority of the writers, who concede that the expanded form of *interesse* is the one applicable to delicts.²²²

²¹⁷ See for instance Cataldini, *Tractatus in Materia Syndicatus*, n.158: “...si iudicet per gratiam dolum, vel iniuriam, vel inimicitiam, punitur in veram lucis aestimationem...” and n.134: “Iudex qualiter plures condemnare debeat, ut quilibet ad totam summam teneatur.” Alciati, *Opera*, tom.III pars.I lib.II de pactis L.XXIX.73: “...nempe ut si dolo malo, aut per gratiam male iudicaverit, in totius litis aestimatione condemnatur.” Baldus de Ubaldis, *Consiliorum*, 2.Cons.196 n.2: “...condemnandus in expensis, & damnis provenientibus occasione litis.” Gloss ‘Aestimationis’ C. de poena iudicis 7.49.2; De Puteo, *De Syndicatu*, 535 n.14.

²¹⁸ Engelmann, *Wiedergeburt*, 354-355.

²¹⁹ *Ibid.* at 355: “Eine nähere Erklärung der Bedeutung der “vera aestimatio lites” gibt die Glosse nicht. Auch die Lehre beschäftigt sich damit nicht...Auch bei der eingehenden Behandlung der Frage des zu ersetzenden Interesse in der Vorlesung zu VII. C. de sentent., quae pro ed quod inerest, wird von Bartolus, Baldus, Salicetus, Fulgosius, Decius u.a. nichts näheres über die Leistung des “aestimatio litis” gesagt.”

²²⁰ As quoted by Engelmann in *ibid.*

²²¹ This is ascertainable from Bartolus’s own words in *Commentaria*, tom.X. Consilia, Questio IX n.19 where he denies liability of the iudex in cases of a void judgement (*sententia est nulla*): “...quando sententia est nulla, iudex non facit litem suam sed quo ad totale interesse, sed quo ad expensas propter hoc factas, & caetera damna...”. See also Wieling, *Interesse und Privatstrafe*, 39. Similarly Lange, *Schadensersatz und Privatstrafe*, 125 in his discussion of the liability of the judge in his extensive thesis indicates all existing peculiarities with regard to the *vera aestimatio lites*. Note Erasmus, *THR-HR* 38 (1975), 116 who states that: “...the *interesse extra rem* (*extrinsecum*) denoted compensation for consequential loss.”

²²² Erasmus, *THR-HR* 38 (1975), 116 states: “In delict...the *interesse extra rem* was regularly awarded.”

3 6 2 Damages in cases of misjudgements given *per imprudentiam*

The scope of liability in cases of *litem suam facere per imprudentiam* was determined not by reference to the loss suffered but was at the discretion of the (second) judge: "...in quantum de ea re aequum religioni iudicantis videbitur...".²²³ It has been pointed out above that this regulation gave the (syndicate) courts a rather flexible doctrine to determine the liability of the judge in the event of carelessness or ignorance.²²⁴ The availability of a discretionary decision made it possible to take into consideration various aspects such as the degree of legal expertise and experience of the judge, the gravity of the judge's culpability or neglect, and also any possible contributory negligence of the injured party. However, the latter occurred only in very rare circumstances.²²⁵ In the main, contributory negligence was not yet accepted as a relevant factor in the assessment of damages.²²⁶

4 LIABILITY FOR INFRINGEMENTS OF PERSONALITY RIGHTS

The term *iniuria* was generally applied to a number of situations where judges committed professional mistakes. *Iniuria* in its most common meaning was characterised by *contumelia* or disregard of another's personality. However, as indicated, *iniuria* also continued to be understood in the sense of inequity and injustice. The latter two especially were of considerable importance to judicial liability since wrong judgements, the infliction of torture, or imprisonment all obviously caused an infringement of personality rights when committed with *animus iniuriandi*. Theoretically at least, an action under the *actio iniuriarum* was conceivable for any of these acts since all of them could easily be covered by the term *iniuria*

²²³ *Inst* 4.5 pr; *Gloss* 'Discriminis' C. de poena jud. 7.49.2: "*Si autem sine dolo hoc est per imprudentiam, tunc teneatur actione in factum, in quantum bono iudici videtur.*" Amodeus, *Tractatus Syndicatus*, n.127: "*...si potestas vel iudex fuit in levi vel levissima culpa, non tenetur iudex insolidum, sed quantum religioni syndicatorum aequum. videbitur.*" Alciati, *Opera*, tom.III pars.I lib.II de pactis L.XXIX.76: "*...ex imprudentia quatenus de bono et aequo visum fuerit...*". A de Ubaldis, *Digesti novi*, de actionibus et obligationibus 'si iudex' n.2: "*...ideo ex hac imperitia puniendus venit quatenus religioni syndicatoris sui videbitur equum fore.*" De Puteo, *De Syndicatu*, 533 n.7: "*Iudex qui iudicavit per imperitiam, tenetur in quantum bono viro videbitur aequum, scilicet in quantum facere potest...*". See also Engelmann, *Wiedergeburt*, 377-383; Lange, *Schadensersatz und Privatstrafe*, 125.

²²⁴ See above at 3 2 fn191.

²²⁵ Lange, *Schadensersatz und Privatstrafe*, 125; Engelmann, *Wiedergeburt*, 378.

if applied in its wider sense. In practice, however, it seems that (initially at least) the Italian jurists preferred to redress these forms of judicial misconduct by means of criminal actions rather than the *actio iniuriarum*; for often the conduct complained of would constitute a crime under the *lex specialis* – for instance a wrong judgement constituted *falsum*, and a wrongful sentence to torture resulting in death was punishable under the *lex Cornelia de sicariis*.²²⁷ Where none of the special crimes applied, recourse lay to the private penal *actio iniuriarum*.²²⁸ One of the reasons for this subsidiary use of the *actio iniuriarum* might be seen in the application of the concept of *dolus praesumptus* also in cases of liability under the *actio iniuriarum*. In order to appreciate the position of the Glossators and Commentators in this respect, it is essential to distinguish between three aspects, namely the general position with regard to the application of *dolus praesumptus* under the *actio iniuriarum*; secondly the general exception to the normal presumption, and thirdly the question of whether judicial liability falls under this exception.

Generally, a (formal) presumption of *dolus* also applied to the *actio iniuriarum*.²²⁹ Where a *prima facie* injurious act was established by the plaintiff, to overcome the difficulty of proving a state of mind, *animus iniuriandi (dolus)* was simply presumed. An ordinary *praesumptio iudicis* already came into operation with certain indications of so-called *atrocitas facti*, for which an infringement of personality rights sufficed.²³⁰

This presumption appears to have been limited in a number of cases, causing now the plaintiff to assume the burden of showing that the defendant had in fact been motivated by *animus iniuriandi*. Where the plaintiff was unable to do so, the defendant was presumed to have acted without *animus iniuriandi* and thus could not be held liable.

²²⁶ Lange, *Schadensersatz und Privatstrafe*, 71-73; Wieling, *Interesse und Privatstrafe*, 223.

²²⁷ Stock, *Amtsverbrechen*, 64, 78; Schmidt-Speicher, *Rechtsbeugung*, 16; Engelmann, *Wiedergeburt*, 436.

²²⁸ A useful overview on the various consequences both *podestà* and judges had to fear in cases of *iniuria* (in its wide sense) and the relationship between the various actions is included in Amodeus, *Tractatus Syndicatus*, nn.109-119. For liability under the *actio iniuriarum* see n.111.

²²⁹ That is rightly stressed by Pauw, *Persoonlijkheidskrenking*, 50: “Hierdie onderskeid tussen formele en materiele *dolus praesumptus* is van groot belang vir sowel die *dolus*-begrip as vir *animus iniuriandi*.” Further, Walter, *Actio Iniuriarum*, 61; Ranchod, *Foundations*, 37; Engelmann, *Schuldlehre*, 132.

²³⁰ Engelmann, *Schuldlehre*, 132: “Allerdings sah man einen genügenden Präsumtionsgrund schon in der ‘*atrocitas facti*’...Bei den Meisten ist aber unter ‘*atrocitas facti*’ mehr die schlimme Art der Handlung nicht notwendig der schwere Erfolg zu verstehen, sodaß sie nicht bei jeder Tötung vorliegt, aber schon bei einfacher Injurie vorhanden sein kann.”

But did judicial liability fall under this exception? Apparently it did, since *D* 47.10.13 imposed a full onus on a plaintiff to prove that a person in authority had committed a *prima facie iniuria*.²³¹ In light of the close interaction between purely administrative and judicial offices in those days, there is no reason to believe that this exception did not apply to judicial officers. From Amodeus we learn for instance that in a case where an accused was tortured and dies while in custody the judge was presumed to have not acted either intentionally (or negligently) if the accused was an adult and robust person (*maturae et robustae*).²³²

If one were to classify this exception dogmatically by comparing it to the situation under the *actio legis Aquiliae*, it appears that once again there operated a counter-presumption in favour of the judiciary. This privilege must be seen as the product of, firstly, the prestige and repute of the judicial office which granted to those who held it considerable scope for infringement of personality rights, and, secondly, of the need for effective administration of justice, all of which squares well with the importance that was attributed to the judicial office in medieval Italian towns.²³³

This privilege was not unlimited; but (as in Roman law) none of the authorities provides us with a detailed statement on when precisely the limitation applied. Most likely, the judge had to overstep the boundaries of his office (*excedere fines officii*), but we are left in the dark as to the limits.²³⁴

5 PROCEDURAL ASPECTS AND THEIR PRACTICAL IMPLICATIONS

An essential feature of judicial liability in medieval Italian law is the aspect of enforcement, the so-called syndication or syndicate procedure. In fact, the system of virtually unrestricted liability for any kind of judicial culpability becomes intelligible only if we take into account both the triggering causes and the practical aspects of procedural enforcement.

²³¹ See also Walter, *Actio Iniuriarum*, 61; Ranchod, *Foundations*, 39.

²³² Amodeus, *De Syndicatu*, n. 114.

²³³ De Puteo, *De Syndicatu*, 560 repeated what the Romans believed, namely that: "*Judicare est munus publicum*."

The legal-political background that was responsible for the rigorous system of judicial liability in Italy of the thirteenth to sixteenth centuries has been dealt with in great detail in the introduction to this chapter. Reference was made primarily to the rise of the *podestà* form of government, including its characteristic features like the frequent recruitment of external judges for short terms to guarantee the impartial and effective administration of justice, as the central means of restoring and protecting the cities' internal order. This considerable task was tied to far-reaching jurisdiction, princely remuneration and also to tremendously high expectations as to judges' professionalism, corresponding with the ever-growing professionalism at the law schools that had emerged in Italy since the late eleventh century. To realise the ambitious goals of *podestà* government, Italian jurists took the rules of judicial liability from Roman law and developed them to harmonise with the principles of the *ius commune*. On the level of procedural law, the features of the *ius commune* came to be supplemented by the regulations of syndication. It is no exaggeration to say that it was only with the appearance of syndication that judicial liability assumed its rigorous form.

The object of the syndicate procedure was to subject the *podestà* and his officers, including the judges, to a formal inquiry into their orderly exercise of office over its entire term. Owing mainly to restricted jurisdiction outside their borders, Italian communes had no chance of seizing foreign officials after they had left the town of their office. Consequently, any possible complaints with regard to irregularities, corruption, denial of justice or misapplication of laws had to be heard before the official left town. The actual justification for any such complaint was determined according to the relevant principles of civil or criminal law. Legal consequences were imposed directly and without delay. The dogmatic foundation of the syndicate procedure lay in the doctrines of the *ius commune*, but the relevant regulations were embodied primarily in the local statutes, which took cognisance of specific situations and the peculiarities of each town.²³⁵

²³⁴ See the remarks by Joubert JA in *May v Udwin* 1981 1 (A) 13 (E) - 14 (D).

²³⁵ There have been efforts in legal historical literature to base the law of syndicate procedure particularly on Roman law. In this regard Professor Engelmann in *Wiedergeburt* at 469 and 503 takes into account the *Codex's* fifty-day-rule (C.1.51.3) which applied to imperial servants and obliged them to stay on for that time in the province of their service for the sake of accountability. Furthermore he based Italian syndicate procedure on the Roman municipal procedure of accountability, for which see Mommsen, *RS*, 767 and Curchin, *Local Magistrates*, 66-67 who deals particularly with the Spanish *usus*; note also Engelmann, *Wiedergeburt*, 515-516, as well as on the Roman *crimen repetundarum*. With regards to the latter see Mommsen, *RS*, 723-725; Engelmann, *Wiedergeburt*, 517 and Genzmer's critical remarks in *ZSS (RA)* 61 (1941), 349-350. A

In this context, both the *ius commune* and the local statutes provide us with extensive legal material so that we are able, for the first time, to draw a complete picture of the system of procedural enforcement of judicial liability.²³⁶

The term syndicate procedure derives from the Latin *syndicus*, which in Roman terminology indicated the legal advisor of a corporation.²³⁷ This form of process can be characterised by the entering of various civil or criminal claims against the *podestà* and his officials, a considerable percentage of which were instituted by the cities directly. Consequently, it was to some extent the *syndici communes* who were active before the syndicate courts to represent the cities in their claims, petitions or announcements. The term syndicate procedure can thus be explained as a terminological mixing of the cities' office of *syndicus* with the function of the syndicate courts. It must be understood that a city's syndicate court was by no means identical with the ordinary courts of the *podestà* and his foreign judges. The syndicate court was a special court for the purpose of reviewing the outgoing *podestà* and his judges.

In addition, one should not make the mistake of considering all members of the syndicate courts legal professionals.²³⁸ The composition of the syndicate courts was not homogeneous. According to the *ius commune*, the newly elected *podestà* and his judges served as syndicate judges of their predecessors.²³⁹ According to statute law, however, (to which primary attention must be accorded) the number of judges in syndicate courts ranged from three to eight and, in smaller communes, was as small as one. The majority of these judges were not legal

different interpretation is provided by Stern, *Criminal Law System*, 138 with reference to Masi, *RISG* 1-2 (1930), 50-51. According to her, the basis of the syndicate procedure must be seen in the realities of city government under the bishops before the communes assumed self-government. Reference is made to the bishops' *episcopalis audientia*, which used to be an efficient means of control. See also Engelmann, *Wiedergeburt*, 518 in this regard, furthermore Stock, *Amtsverbrechen*, 51 fn15.

²³⁶ At this point, reference must be made again to the formidable work by Engelmann who quotes practically all relevant sources of the *ius commune* and statute law at *Wiedergeburt*, 467-585. Dawson, *Oracles*, 134-138 relied on Engelmann's book for his presentation of syndication. Further comments are included in Masi, *RISG* 1-2 (1930), 45-115 and 331-411; Padoa Schioppa, *Ricerche Sull'Appello*, vol.II 201-203; Giuliani and Picardi, *Responsabilità*, 32-37; Stern, *Criminal Law System*, 137-149; Martines, *Lawyers*, 143-145. Genzmer, *ZSS (RA)* 61 (1941), 345-354 provides a useful summary of Engelmann's work. Some information is also provided by Schrage's contribution in *Legal History* 17 (1996), 105.

²³⁷ See *D* 3.4.1.1. and *D* 50.4.18.13.

²³⁸ Engelmann, *Wiedergeburt*, 494.

²³⁹ *Ibid.* 491-492; Dawson, *Oracles*, 137.

professionals but lay judges selected from the ranks of the local citizenry by drawing lots or by election. A remote similarity to the procedure at the time of the Roman Republic cannot be denied, but was not acknowledged by the jurists of the time.

Generally, the syndicate judges were assisted by a legally trained jurist from one of the local guilds of jurists (*iudex* or *doctor legum*).²⁴⁰ The incoming *podestà* and his officials frequently acted in a double role. They functioned as executive officers with regard to the judgements and titles handed down by the syndicate courts and were further assigned control of the syndicate court's administration of justice.²⁴¹ The syndicate courts were acknowledged as an extraordinary organ of administration of justice. The court gathered only for the purpose of the syndicate procedure, that is for about 7 to 15 days.²⁴² It is a remarkable indication of the precarious and unstable situation of those days that cities introduced considerable safeguards to ensure the impartiality and independence of the syndicate judges. For instance, syndicate hearings were conducted in the communal palace on consecutive days without postponement. The syndicate judges were not permitted to leave the palace during that time. It was forbidden to meet the syndicate judges while the hearings were pending.²⁴³ From the fourteenth century, it is reported that some cities recruited members of their syndicate courts once again from foreign judges.²⁴⁴ A special syndicate court was sometimes created to syndicate the original *syndices*.²⁴⁵

Originally, during the thirteenth and fourteenth centuries, it was exclusively foreign judges who were subject to syndication.²⁴⁶ This did not mean that local judges did not face legal responsibility for professional mistakes. Rather, one must assume that local officials throughout the year were tried by the *podestà* and his judges before the ordinary courts. From

²⁴⁰ Martines, *Lawyers*, 144; Engelmann, *Wiedergeburt*, 495-499; Stern, *Criminal Law System*, 146; Genzmer, *ZSS (RA)* 61 (1941), 348; Masi, *RISG* 1 (1930), 138; Dawson, *Oracles*, 137.

²⁴¹ Engelmann, *Wiedergeburt*, 485.

²⁴² Engelmann, *Wiedergeburt*, 492 and 522.

²⁴³ Stern, *Criminal Law System*, 147; Engelmann, *Wiedergeburt*, 508-509; Dawson, *Oracles*, 138.

²⁴⁴ Engelmann, *Wiedergeburt*, 495, 497 and 511-512.

²⁴⁵ Engelmann, *Wiedergeburt*, 512-513; Genzmer, *ZSS (RA)* 61 (1941), 349. Engelmann would certainly not have supported this critical conclusion. To him the syndicate procedure and what triggered its appearance are worth a particularly positive approach. More critical are Dawson, *Oracles*, 137 fn12 and Wieacker, *ZJGS* 60 (1941), 591-601. For a critical assessment of Engelmann's biases see above at fn50.

²⁴⁶ The *podestà's familia* was generally included in liability on the basis of specific legislation. See Engelmann, *Wiedergeburt*, 506-507.

the fifteenth century, however, local officials were increasingly subject to the extraordinary syndicate courts.²⁴⁷ The jurisdiction of the syndicate courts was relatively extensive. It covered all conceivable civil actions against judges for *dolo* or *imprudencia* misjudgements; furthermore, criminal actions and any other claims on the grounds of either *ius commune* or statute law that arose during the term of office.²⁴⁸ The limited jurisdiction of the towns make it plain that from the day of departure from the town of service, no further action could be taken.

In the light of this locally as well as temporally restricted means of acting against foreign judges, it is evident that those regulations carried prime weight that ensured the judges' subordination to the syndicate proceedings. The chief protective measure was the oath of office, whereby the *podestà* and his *familia* pledged to remain in the town for a certain period after termination of office and to appear personally before the syndicate court. In addition, the contract of service carried much the same obligations. Over and above this, there are frequent indications of the furnishing of bail, surety or pledges. From the early fourteenth century, the cities regularly withheld the final two months salary, about one third of the full salary, as a pledge. The law of liens and pledges applied not only to the salary but in addition to the equipment, books, horses, arms, in short the official's whole inventory. A further means to subordinate the foreign judges to the syndicate proceedings must be seen in the frequent obligation imposed on officials to waive their right to appeal against the syndicate court's decision.²⁴⁹ Finally, statutes strictly prohibited any deviation from the rigorous rules of syndication. Only by means of formal legislation were officials and judges exempted from subjugation to the syndicate procedure.²⁵⁰

If we turn our attention to the procedure itself, it will become obvious that syndication was neither a purely civil nor a criminal procedure but appears to have been a formal inquiry as well as a summons which combined a multitude of actions against the foreign officials. Under

²⁴⁷ Stern, *Criminal Law System*, 143; Dawson, *Oracles*, 137; Engelmann, *Wiedergeburt*, 471-473. According to Masi, *RISG* 1-2 (1930), 85 this was already the case in fourteenth century Florence.

²⁴⁸ Stern, *Criminal Law System*, 139; Engelmann, *Wiedergeburt*, 473 and 502-505; Genzmer, *ZSS (RA)* 61 (1941), 348.

²⁴⁹ Engelmann, *Wiedergeburt*, 483-490; Dawson, *Oracles*, 137; Stern, *Criminal Law System*, 147; Genzmer, *ZSS (RA)* 61 (1941), 347; Kantorowicz, *ZSS (RA)* 44 (1924), 260.

²⁵⁰ Engelmann, *Wiedergeburt*, 473-483; Genzmer, *ZSS (RA)* 61 (1941), 346-347.

the roof of the syndicate procedure thus fell such different civil actions as the *actio legis Aquiliae*, the *actio in factum* or the private penal *actio iniuriarum*.

Syndication was instituted with the selection and appointment of the members of the syndicate court within the first few days after the new *podestà* and his officers had assumed office.²⁵¹ Subsequently, commencement of syndication was announced publicly and calls were made upon the people to come forward with any complaints or actions within a prescribed period. Generally, this period was set at about 7 to 15 days and matched the time limit of the syndication procedure.²⁵²

In practice, the syndication procedure was informal. Under both the *ius commune* and statute law, conventional principles of procedural law were limited. This is evident for instance from the assertion of claims. The prevailing opinion together with the Gloss considered a formal statement of claim superfluous in an civil action against a judge for damages. The institution of an action was *ex non scripto*.²⁵³ A later opinion, however, sought the restriction of informality on small claims. The regulations embodied in the statutes permitted even greater informality. A plaintiff could institute his action in an informal manner orally or in written form. Over and above this, it was not necessary, contrary to the *ius commune*, to provide for a specific application or reference to a specific action. For instance, it was not necessary to subsume a *dolo* or an *imprudencia* misjudgement under the *actio legis Aquiliae* or an *actio in factum*, respectively.²⁵⁴ In other words, the basic appearance of an informal *actio syndicatorum* levelled any distinctions between the various actions including the *actio iniuriarum*. All actions came to be instituted under a general *actio syndicatorum*.

This strong tendency against formality prevailed also in the syndicate proceedings themselves.²⁵⁵ Once again, meaningful extensions were contained in the statute law. To all

²⁵¹ Engelmann, *Wiedergeburt*, 489-490, 522-523; Kantorowicz, *ZSS (RA)* 44 (1924), 247-248 and 257-260 provides an interesting account of the practical implications (and risks) of the office of foreign judge in the thirteenth century at Bologna.

²⁵² Engelmann, *Wiedergeburt*, 523, 535-536 and 567-572; Genzmer, *ZSS (RA)* 61 (1941), 351.

²⁵³ Engelmann, *Wiedergeburt*, 526.

²⁵⁴ Engelmann, *Wiedergeburt*, 529-534.

²⁵⁵ Ibid. 541-542: "Der Sindikatsprozeß ist nach der gemeinrechtlichen Lehre ein außerordentliches Verfahren, in welchem zivilrechtliche Ansprüche...mündlich und formlos "sine libello" nach der vorherrschenden Lehre allgemein, nach anderen nur in Kleinwert- und Armensachen geltend gemacht werden können...".

actions, civil or criminal, there applied an abridged and informal procedure. This concentrated procedure was further relieved of any requirements as to writing, fixed hearings or pleadings. From the thirteenth century a uniform procedure applied to all conceivable actions against a judge. Due to the principal aim, namely to provide as soon as possible for transparency in all legal matters, the syndicate judges were soon assigned full discretion to verify not only the specific claim instituted but to extend the inquiry into all relevant acts.

Consequently, syndicate courts were empowered to use unrestricted inquisitory powers, notwithstanding the ordinarily strict requirements (*denunciato, infamatio, notorium*), in order to decide even civil claims for *dolo* or *imprudencia* misjudgements.²⁵⁶ Civil and criminal aspects were completely fused. Thus, the *actio de syndicatu* commenced with a general inquiry. In cases of reasonable suspicion, there followed a so-called special inquiry through interviewing all who appeared to have been involved in the case, including the judge himself, the plaintiff, the advocates, attorneys and witnesses, in addition to the evaluation of other evidence such as records and judgements. Therefore, the statutes also referred to the *ius inquisitionis generalis et specialis* of the syndicate judges. From this it follows that the Italian syndicate procedure was nothing other than an official (*ex officio*) inquiry. It was frequently the case that the syndicate courts relied on professional legal advice either from the notable jurist who was assigned to the court or from other external advisors.²⁵⁷

If after hearing of all evidence the syndicate court came to the conclusion that the complaints were unfounded, the proceedings were terminated with a formal acquittal. The loser had to bear the expenses.²⁵⁸ If the plaintiff's claim was considered justified, there applied the general rules as to execution. Execution was enforced by the incoming *podestà* and his *familia*. In this respect the practice of retaining one third of the officer's salary proved quite effective in itself. A successful plaintiff merely had to apply to the *podestà* for payment of the sum the judge owed him in consequence of the judgement of the syndicate court.²⁵⁹ Either by express

²⁵⁶ See Sbriccoli, *Justice*, 48-52 for details.

²⁵⁷ Martines, *Lawyers*, 144-145 indicates that at Florence the *syndices* regularly adopted a group of up to four professional lawyers as consultants.

²⁵⁸ Engelmann, *Wiedergeburt*, 529.

²⁵⁹ *Ibid.* 585; Kantorowicz, *ZSS (RA)* 44 (1924), 266.

legislation or by oath of office, any appeal against the decisions of the syndicate court was excluded.²⁶⁰

It may be said without exaggeration that the Italian syndicate procedure represented a totally new aspect of judicial liability. This is undoubtedly true with regard to the substantive law of judicial liability, which indicated a further refinement of the Roman law, but is even more so with respect to the procedural means of enforcement that were developed by the Italian jurists or the statutes. Without intending to anticipate the following chapters, it may fairly be said that under Italian syndicate procedure there prevailed a higher degree of procedural enforcement of claims against judges by private plaintiffs than at any other time in the course of European legal history. The level of judicial accountability to litigants was considerably higher than in any subsequent period.

²⁶⁰ According to *ius commune*, however, appeals against judgements of the syndicate were not prohibited. Hence, wherever the statutes lacked precise regulation, the rules of *ius commune* applied, Engelmann, *Wiedergeburt*, 577-581 and 574-577.

“Car parmy la varieté des affaires humaines, parmy le nombre infiny des loix, ordonances, & coustumes, parmy la diversité des opinions des hommes, parmy la malice des parties, parmy la negligence d’aucuns Advocats, parmy la surprise des Procureurs, parmy l’ignorance des Greffiers, qu’elle apparence y auroit-il, qu’un Iuge deust garantir tous les iugements qu’il rend de saine consciences, & avec droite intention?”

(Charles Loyseau¹)

V ROMAN-DUTCH LAW

1 INTRODUCTION

From the tenth century to the Peace of Westphalia (1648) the 17 Netherlandic territories, with the exception of Flanders and Artois, belonged politically to the Holy Roman Empire of the German nation. The various provinces of the empire were administered by the successors of the counts and dukes who, as has been shown for the earlier Carolingian period, were the emperor’s chief local executive officers. Typically for this pattern of historical development, the Low Countries consisted of two earldoms, four duchies, six counties and five territories. From the late fourteenth century, most of these 17 territories came under the rule of the Burgundian dukes either by purchase, marriage or military force. However, it appears that under neither Burgundian nor Habsburgian rule (from 1477), nor during the Republic (from 1581), did the latent peculiarities of the Dutch territories and cities cease to exist.² Thus, the labelling of these territories in the plural – Low Countries – mirrored exactly the reality.

On the surface, the general pattern of development in the Netherlands from the fourteenth century onwards was typical of the prevailing political tendencies throughout Central Europe

¹ *Du Droict des Offices*, 1.14.31.

² De Vos, *Regsgeschiedenis*, 126-129; Lademacher, *Niederlande*, 15-17; Zeeden, *Hegemonialkriege*, 100-103; Lutz, *Reformation*, 106.

that gave birth to the modern state.³ This general development led from the feudal monarchy of post-Carolingian times to a form of government where active estates (clergy, nobility and cities) frequently participated in the ruler's government (*Ständestaat*), to government where the rulers increasingly drove the estates out of government (*Fürstenstaat*), from where it was only a small step to absolutism. An important step in this transformation process in the Dutch provinces was the establishment by the Burgundian dukes of a centralised and omnipotent administration in their realm.

This marks the emergence of what Professor Kantorowicz has referred to as the 'King's first body': the dukes became supreme judge, legislator, chief executive, *fiscus*, all in one, and thus the incarnation of the non corporeal and immortal body politic (the crown). This was distinct from the 'King's second body', the dukes in their mortal, that is natural, capacity, the body natural.⁴ To serve the aims of their 'first body', the dukes created a general council of advice which occasionally sat as a central court of appeal and from which a separate and permanent appeal court emerged in due course.

University educated jurists, frequently from the ranks of ambitious *bourgeois* or lesser noblemen, assisted the dukes in the administration of justice, the enactment of legislation, and the determination of domestic and foreign affairs, and they managed the monarch's domains, finances and military affairs.⁵ With regard to the dispensation of justice, the rulers were hesitant to become personally involved too often and, even though the councils' decisions and verdicts continued to be made in the name of the ruler, the majority were pronounced by the councils themselves by delegation of the monarch's authority.⁶ Hence, there appeared a group of state servants on the benches of the sovereign's courts who were

“...content with fulfilling the increasingly technical tasks for which their legal training had well prepared them in a spirit of obedience and respect within a new vertical and coercive relationship of master and subject.”⁷

³ Van Caenegem, *Historical Introduction*, 99-106 and *Place of the Low Countries*, 13-14; Lutz, *Reformation*, 15-16 and particularly 126-130.

⁴ Kantorowicz, *The King's Two Bodies*, 13 quoting Blackstone, *Commentaries*, vol. I 249.

⁵ De Schepper and Cauchies, *Legal Tools*, 250.

⁶ Hartung, *Verfassungsgeschichte*, 46 in this respect refers to the characteristic custom of leaving a seat free for the absent monarch at state council meetings. See also De Monté ver Loren and Spruit, *Hoofdlijnen*, 137; De Schepper and Cauchies, *Legal Tools*, 250.

⁷ De Schepper and Cauchies, *Legal Tools*, 255-256.

It is evident that the Burgundian rulers and subsequently their successors, the Spanish kings of the Habsburg dynasty, were not only interested in controlling these servants of the state; they succeeded in doing so. Councillors came to be salaried exclusively by the rulers; they were transferable and removable and thus held office only by the grace of the ruler (*soo langhe alst ons gelieven sal*).⁸ There were prospects of promotion, sometimes even ennoblement, but, above all, the new-style councillors were made individually responsible to the rulers by various technical and legal means.⁹ In consequence, judicial liability once again became a valuable policy instrument, now in the hands of the Burgundian and Habsburgian monarchs in their quest for centralisation and control of public institutions. There can be no doubt that, by the middle of the sixteenth century, Charles V and Philip II ruled the Netherlands as a typical *Fürstenstaat* from where it was only a small step to true absolutism, characterised by the triad of sovereignty, *raison d'état* and *politie*, i.e., public order in the widest possible sense.¹⁰

However, the situation in the Netherlands may not have been as typical of the situation in Central Europe as appears at first sight. At the time, there probably existed in Europe few areas where the provincial estates had become as strong as in the Netherlands. On the basis of numerous privileges and exemptions granted to the growing cities, from as early as the twelfth century, the Low Countries emerged as an economic stronghold, the only region in Europe that could compare with the central and northern Italian region. The Low Countries were easily among the most urbanised in late medieval Europe.¹¹ Ghent, Bruges, Rotterdam, Amsterdam and Antwerp were actively engaged in trade, the latter two accounting for a turnover in the early sixteenth century of over 50% of all goods traded in Europe.¹² The largest cloth manufacturing industry in Europe was for a time concentrated in Flanders; Delft, Haarlem and Gouda were famous for their breweries. With regard to the financial sector,

⁸ *Ibid.* at 250 and 255.

⁹ *Ibid.* at 255 and 264 states: "In the fifteenth and sixteenth centuries, the Burgundian-Habsburgian monarch became the supreme judge, who could control and judge his civil servants, as well as supreme 'legislator', and, finally the dominant authority able to grant grace."

¹⁰ Wesel, *Geschichte des Rechts*, 354; De Blécourt and Fischer, *Kort Begrip I*, 27-28.

¹¹ The Burgundian Low Countries had no less than 208 cities of which 16 counted more than 10 000 inhabitants. Only six of these cities lay in the province of Holland. In comparison, around 1500, there existed in the entire German Empire c. 3 000 towns with city rights, of which a mere 12 to 15 had more than 10 000 citizens. In the fifteenth and sixteenth centuries, Ghent and Antwerp, respectively, were the largest and second largest town north of the Alps. See Lademacher, *Niederlande*, 21-25 and Lutz, *Reformation*, 7 for details.

¹² Kinder, *Atlas*, 245; Lademacher, *Niederlande*, 18-21; Hahlo and Kahn, *Legal System*, 526.

Antwerp's stock exchange was one of the most important in Europe.¹³ Like the German emperors of the twelfth and thirteenth centuries in Italy, the Spanish-Habsburgian rulers kept a close eye on the Low Countries, from which they collected seven times as much in taxes as they gained from the silver consignments from the Americas.¹⁴

The clash between the economically vibrant and politically strong Dutch provinces and Charles V and his son Philip II, as soon as the latter pushed for centralised, dynastic structures of government at the expense of the estates, is the central theme in Dutch history of the sixteenth and seventeenth centuries. This power struggle was intensified by religious controversy and the tremendous gains made by Calvinism, Lutheranism and Anabaptists from the sixteenth century onwards, especially in the powerful northern provinces. Charles V, and more so Philip II, were disinclined to yield to Protestantism.¹⁵ The struggle ended in the victory of the estates, and in 1581 the northern provinces declared their breakaway from Spain in the famous placard of dismissal. Undoubtedly, this development sent shock waves throughout Europe and put a dramatic end in the Netherlands to what seemed an open road to absolutism. In 1581, there emerged a state that was a complete deviation from the usual European pattern of the age. It was a state not absolutist but republican, not central but federal; and it was not nationalism that prevailed but a healthy sense of local particularism: the Republic of the United Netherlands.¹⁶

But even the Dutch had difficulty with a political system devoid of an hereditary ruler, the belief being deep-rooted that the source of all authority was the monarch, the indivisible sovereign who was legislator, head of government and supreme judge. The gap left by the dismissal of Philip II was not filled by another monarch and even the so-called governors, the *stadhouders* from the House of Orange-Nassau, Prince Maurice and Prince Frederick Henry,

¹³ Zeeden, *Hegemonialkriege*, 104.

¹⁴ Kinder, *Atlas*, 245.

¹⁵ De Vos, *Regsgeschiedenis*, 131-133; Lademacher, *Niederlande*, 34-36, 71; Zeeden, *Hegemonialkriege*, 105; Van Deursen, *Het Koppergeld*, 154-170; Lutz, *Reformation*, 77-79.

¹⁶ Van Deursen, *Het Koppergeld*, 155-156; Lademacher, *Niederlande*, 152 states: "Das Land stand abseits der europäischen Norm. Es entwickelte sich als Republik inmitten eines Staatensystems und zum Teil gegen eine Mächteumwelt, die den Lehren des Absolutismus anhing. Es pflegte seine vorrevolutionäre Struktur der kollektiven Souveränitäten... Gemessen an den zentralistischen Tendenzen der europäischen Umwelt, bot die Republik ein System der ganz besonderen Art... Man huldigte vielmehr einem zuweilen zum Exzeß neigenden föderalen Prinzip...".

never managed to rise above what was at most a quasi-monarchical position. The crucial question thus was: Who would be the sovereign of the Netherlands after independence?

In the final analysis, the Republic may be considered a *statenbond* whose members, the provinces, were republics in their own right¹⁷ who had renounced the right of secession, *ten ewygen daghen*. This notwithstanding, for all practical purposes the powerful northern provinces were ruled by the regent-patriciate, which jealously guarded its ancient privileges, laws and customs.¹⁸ On a national level, so to speak, the *hoge overigheid* consisted of the Estates-General as the government of the Republic, as well as the *raad van state* and the *stadhouder*. In domestic affairs, each province was governed by an estate, its own *stadhouder* and its own superior law courts which heard appeals from the local provincial court.

In provincial government, particularly in the most important province, Holland, the cities continued to hold a key position. Economic development was not seriously curtailed by the struggle for independence from the Spanish-Habsburgians. After separation and independence, the cities of the north soon became leaders in global trade. Inventions in the field of shipbuilding, a large commercial fleet, financial resources, commercial long-sightedness, as well as the foundation of trading companies such as the Dutch East India Company (VOC), established the Netherlands as a maritime world power of the first rank during the seventeenth and early eighteenth centuries; and this, in turn, led to the prosperity of the entire country.

However, from as early as the second half of the fourteenth century, the cities' steady growth in economic and political power was accompanied by growing conflict between town and country and, moreover, by increasingly pressing internal social problems in the cities. As in Italy, there emerged factionalism and the divergent interests of the so-called regent-patrician class (*groot burgers*), wealthy merchants and manufacturers, and those of the *klein burgers* as represented by the co-operative craft and artisan guilds, and the wage workers, the so-called

¹⁷ The truth of this becomes impressive from Van Poelgeest's discussion of the difficult procedure for appointment of the members of the *Hoge Raad*, which apparently was a permanent apple of discord between the province of Holland and the province of Zeeland. Included in *Bijdragen* 103 (1988), 27-35. See further Zeeden, *Hegemonialkriege*, 380. Accordingly Holland's importance is stressed by the fact that during the seventeenth century 57.1 % of the inland revenue rooted in Holland (50 % Amsterdam) whereas the following two provinces (Friesland and Zeeland) contributed a mere 11.4 % and 11 % respectively.

creesers.¹⁹ While the patrician class increasingly lost its influence to the guilds at Flanders from 1350 onwards,²⁰ patricians in the northern provinces managed to keep a tight grip on the magistracy by means of the so-called *vroedschap*, colleges of local honoraries of up to 80 members, where membership was restricted by income.²¹ These *vroedschaps* formed the foundation of the republican oligarchies whereby, in practice, a few related families ruled the cities, the cities' seats in the estates and, consequently, the country. As Professor Lademacher aptly comments: "... connubial entanglement made the rule of very few [in]to the rule of [a] few relatives."²² As early as 1581, the provincial estates of Holland decided that the cities' local magistracy was no longer to be staffed partly by members of the guilds, but exclusively by members of the regent-patriciate.²³

To belong to the group of regents, one had to be 'qualified', to use a seventeenth century term, that is, one had to be a person of quality, of good lineage, of good connections and of ample wealth so as to be able to set aside one's own occupation when called to public service.²⁴ Could a mere burgher do such and maintain himself and his family? The answer of course was that he could not, as may be gleaned from the words of the famous Dutch writer Joost van den Vondel, who asked his readers:

"Whether the judge who is amply supplied with goods
And money, does as much harm to the law,
As a poor beggar, who will first sort out the case,
And then devour the poor [by demanding] presents and gifts."²⁵

¹⁸ Hahlo and Kahn, *Legal System*, 532; Lademacher, *Niederlande*, 152-153 and 159-166.

¹⁹ For an interesting classification of social classes in republican Netherlands see Van Poelgeest, *Bijdragen* 103 (1988), 23-24 (on the basis of Roorda and Groenhuys).

²⁰ Van Caenegem, *Place of the Low Countries*, 15 observes: "...it is not generally realised how close Ghent, Bruges and Ypres have been, in the days of James and Philip van Artevelde, to the foundation of Italian type urban states of an a-monarchical, if not an anti-monarchical type."

²¹ In the *Groot Placaet-Boek*, vol.I 43 there appears the following passage: "*De steden hebben meestal...een Collegie van Raden ofte Vroetschappen, gheconstitueert zynde van de notabelste uyten midden va de ganzsche Burgerye.*"

²² Lademacher, *Niederlande*, 207; Lutz, *Reformation*, 105.

²³ *Ibid.* at 204.

²⁴ For the following see Lademacher, *Niederlande*, 201-215. At 206 Lademacher refers to the *raadspensionaris* Oldenbarneveldt who once said that children had a claim to their fathers' posts if they proved worthy of their descent by means of *alliancie*, *professie* and *dienste*. The first indicated an acceptable marriage, whereas *professie* and *dienste* referred to a dignified profession and a lifestyle in accordance with the generally accepted *mores* of society. See further Van Deursen, *Het Koppergeld*, 155-170; De Monté Ver Loren and Spruit, *Hoofdlijnen*, 173.

²⁵ Quoted at Van Deursen, *Het Koppergeld*, 160.

In other words, wealth kept one from corruption.

Considering the power and the importance of the cities, the country was in effect ruled and controlled by a relatively small and exclusive oligarchy. And this development was not confined to the powerful cities; it appears to a similar degree in the *platte land*, for instance in the so-called *gritenijen* at Friesland.²⁶ There can be no talk of democratic structures at the time of the Dutch Republic. Democracy was in fact regarded as pernicious by most Dutch writers in the seventeenth century since popular government would have brought people to power who “...have such a nature that they reject what is most useful, and always desire what is useless or forbidden.”²⁷

If one compares the situation in the Netherlands with that in Italy some centuries earlier, despite a number of similarities, the practical outcome of the local internal conflicts in the Netherlands was distinctly different from the communal development of Italy. To some degree, the potential for social conflict also existed in the Netherlands, but at no point did the radical course of civil disorder take hold of the Low Countries as in Italy. Consequently, there is no indication that the cities were ever ruled by a foreign *podestà* or a similar figure to provide for impartial, effective and just administration. Not surprisingly, therefore, Roman-Dutch law at no time provided for the rough and ready reality of a syndication procedure and syndicate courts. As will become obvious in due course, this had a strong effect on the scope of judicial liability.

2 THE POSITION AND STATUS OF JUDGES WITHIN THE ROMAN-DUTCH ADMINISTRATION OF JUSTICE

2.1 The higher courts

The Dutch courts of the seventeenth and eighteenth centuries had their foundations in the medieval court system, where a variety of jurisdictions, namely ecclesiastical, feudal,

²⁶ Lademacher, *Niederlande*, 206; Huussen, *Bijdragen* 93 (1978), 247.

²⁷ Van Deursen, *Het Koppergeld*, 157. See also Lutz, *Reformation*, 105.

seigniorial and municipal, existed alongside the royal or princely jurisdictions.²⁸ In line with what has been said above, the two most important aspects of the reformation of the medieval court system were a policy of centralisation and a trend towards professionalisation.

Centralisation in the Netherlandic territories was established by the Burgundian dukes, as elsewhere, by making a whole hierarchy of institutions available to those who wanted to go to court: a central council, supra-provincial revenue courts, as well as intermediate courts. Generally this aim was achieved by expansion of existing institutions into powerful and efficient instruments of government.²⁹ Under Burgundian authority, the so-called *Grand Conseil*, which functioned both as an itinerant executive and a judicial council for all the territories, gradually emerged from the dukes' advisory body, the *curia ducis*, from 1435 onwards. The establishment of central courts for the various provinces began in 1462, when Charles the Bold established the *Hof van Holland, Zeeland en West Vriesland*.³⁰ The *Instructien van de Hof van Holland, Zeeland and West Vriesland* from 1531 show that the Court had appellate jurisdiction in civil and criminal matters for the three provinces mentioned. The seat of the Court was at The Hague. In the northern provinces, similar courts were established: for Friesland in 1499, for Utrecht in 1474 and for Gelderland in 1547; so too in the southern provinces (referred to from 1581 as the Spanish Netherlands), the *Raad van Brabant* was established in 1427 and the *Raad van Vlaanderen* in 1499.³¹

However, in their quest for primacy and their pursuit of a centralisation policy, the dukes moved further ahead in 1473, and established the *Groote Raad* at Mechelen as a permanent court of appeal for the entire Burgundian realm, the so-called *Groote Raad van Mechelen*, also

²⁸ For a detailed overview of the development of the judiciary in the Low Countries since the Middle Ages see the standard work by De Monté ver Loren and Spruit, *Hoofdlijnen*; Hermesdorf, *Rechtsspiegel*. For a very useful diagram of the various powers that ruled the Netherlands in the sixteenth century see De Schepper, *Gerichtliche Kontrolle*, 59 and Zeeden, *Hegemonialkriege*, 380. Further De Vos, *Regsgeschiedenis*, 143-147; Hahlo and Kahn, *Legal System*, 541-543; Hartog, *Onrechtmatige Overheidsdaden*, 16-18. See also Fockema Andreae, *Staats- en Rechtsleven*, 69.

²⁹ De Schepper and Cauchies, *Legal Tools*, 250.

³⁰ With regard to the *Hof van Holland* see Van der Linden, *Judicieele Practijcq*, 1.3.14; Lademacher, *Niederlande*, 37.

³¹ Dolezalek, *Zivilprozessrecht*, 64; Hahlo and Kahn, *Legal System*, 474; Hosten *et al*, *Introduction*, 309. See Hermesdorf, *Oud Vaderlands Recht*, 157 *et seqq.* For the Court of Gelderland see Fruin, *TR* 2 (1920-21), 220 *et seqq.* and 519 *et seqq.* and for Zeeland see *TR* 3 (1922), 30 *et seqq.* For the *Raad van Brabant* see Van der Linden, *Judicieele Practijcq*, 1.2.12 and generally the work by Gaillard, *Conseil de Brabant*. For the *Raad van Vlaanderen* see Van der Linden, *Judicieele Practijcq*, 1.2.13. For the *Raad van Friesland* see Huussen, *Bijdragen* 93 (1978), 244-246.

referred to as the *Parlement de Malines*.³² The *Parlement de Paris*, the High Court for northern France in those days, is commonly regarded as the source of inspiration and influence for the court at Mechelen.³³ The court assumed temporary appellate jurisdiction for Holland, Zeeland, Flanders and Brabant, later also for Friesland, Utrecht and Gelderland, although against strong opposition. After a temporary abandonment, the *Groote Raad* was reinstated in 1504. However, the northern provinces no longer referred appeals to the *Groote Raad*. For Holland, Zeeland and West Friesland, the *Hof van Holland* began to function as an appeal court.

As a consequence of the breakaway of the northern provinces in 1581, the appellate jurisdiction of the *Hof van Holland* was transferred to the so-called *Hoge Raad* in The Hague.³⁴ This appeal court, however, had jurisdiction over only two of the seven republican provinces, namely Holland and Zeeland.³⁵ The other provinces refused to transfer their appellate jurisdiction to the *Hoge Raad*. Thus, practically every province retained its own judicial hierarchy until, in 1795, the *Hoge Raad* finally became the highest appeal court for all provinces.³⁶

It has been indicated earlier that, in consequence of Philip II's dismissal in 1581, the remaining powers in the northern provinces, namely the Estates-General and the judges of the superior courts, were left without an ongoing monarchy which embodied the indivisible

³² Hahlo and Kahn, *Legal System*, 474; Lademacher, *Niederlande*, 37; Wijffels, *Legal Records and Reports*, 182-206. By Wijffels more recently: *TR* 61 (1993), 387-400.

³³ De Wet, *Ou Skrywers*, 104-5. Lademacher, *Niederlande*, 37 points out that it certainly was not by accident that Charles the Bold chose Mechelen as the court's seat. Mechelen belonged neither to Brabant nor to Flanders. It was an ex-territorial spot on the map and its choice thus stresses the objective of centralisation.

³⁴ With regard to the *Hoge Raad* see Merula, *Manier van Procederen*, 1.6.1.13 (2) [d]; Van der Linden, *Judicieele Practijcq*, 1.3.11-13; De Blécourt, *TR* 2 (1920-21), 428 *et seqq.*; De Smidt, *Hoge Raad*, 207 *et seqq.* and most recently the excellent article by Van Poelgeest, *Bijdragen* 103 (1988), 20 *et seqq.* who provides a detailed account of the geographic, professional and sociological background of the members of the court in the eighteenth century as well as the various career patterns; further he analyses the complex procedures for appointment of the judges, the esteem in which judges of the *Hoge Raad* were held, and discusses the decision making process, rules for discharge of office and other aspects of judicial independence.

³⁵ For more details on the - sometimes overlapping - jurisdictions of the *Hof van Holland* and the *Hoge Raad* see Dolezalek, *Zivilprozessrecht*, 71-73 and the authorities cited there. The frequent problems litigants could face due to this *jurisdictiegeschille* between the two courts are stressed by Van Poelgeest, *Bijdragen* 103 (1988), 47.

³⁶ For the development of the judicial structure during the consecutive Batavian period and the period of restoration see Holthöfer, *Justizgeschichte*, 15-23.

sovereignty of the state. Remarkably, thus, reference was to the *ware vrijheid* when William II died in 1650 and for nearly 25 years the first so-called *stadhouderloze tijdperk* was in existence.³⁷ Consequently, at a relatively early stage of European constitutional development, separation of powers, even if not fully worked out (there being no parliament), was at least admitted in the Netherlands in that those superior organs of state which continued to exist in the Republic were separate and differently staffed.

L van Poelgeest for instance provides for a detailed account of the procedure of nomination and appointment of the judges (*raadsheren*) of the *Hoge Raad* in the province of Holland.³⁸ According to a ratio formula from 1596, the province of Holland regularly appointed seven of the obligatory ten judges³⁹ (excluding the president of the court who was nominated and appointed at a special convention of the *leden van de Staten van Holland en de Staten van Zeeland*).⁴⁰ In case of a vacancy, it was the *Hoge Raad*'s privilege to supply a list of six candidates to the *raadspensionaris* of the Estates of Holland out of which the appointee had to be drawn. The *raadspensionaris* then sent the list to the 18 towns of Holland with a seat in the Estates and to the *ridderschap*. By means of a simple majority vote, the 19 members of the Estates chose three candidates. In those times when Holland had no *stadhouder* (1650-1672, 1711-1747), the number one nominee was appointed and furnished with his letter of appointment (*commissiebrief*) by the Estates of Holland (and also of *Zeeland*). When a *stadhouder* was in office, his was the privilege of choosing one from the list of three nominees regardless of the order in which they were voted on by the Estates.⁴¹

³⁷ Lademacher, *Niederlande*, 181.

³⁸ The procedures at the various superior courts of the provinces, however, were not identical. This already appears from Van Poelgeest's account of the differences between the relevant procedure for the appointment of the judges of the *Hoge Raad*, who were nominated on the *Zeeland* 'ticket', and that for judges appointed by Holland. See Van Poelgeest, *Bijdragen* 103 (1988), 27-35 for details. With regard to the procedure in Friesland see Huussen, *Bijdragen* 93 (1978), 252-258.

³⁹ *Groot Placaet-Boek*, vol.II 856.

⁴⁰ Van Poelgeest, *Bijdragen* 103 (1988), 33.

⁴¹ Van Poelgeest at 28 also points to the 'deals' that were made prior the nomination of the three candidates for promotion to the *Hoge Raad*: In particular, smaller towns that were not as influential as, for instance, Haarlem or Amsterdam 'traded' their vote for political concessions in other fields. However, these realities cannot obscure the fact that the judges of the *Hoge Raad* were appointed by means of a comparably advanced procedure that ensured protection from undue influence by any power of state.

‘Separation of powers’ if this term may – cautiously – continue to be used, was further established from 1581 onwards when the superior courts were relieved of the administrative duties which they had exercised since the days of their foundation.⁴² Henceforth, superior courts exercised unlimited jurisdiction in legal matters in their respective provinces.⁴³

The newly won independence of the supreme courts was by and large respected by the other arms of government. There were only occasional examples where other branches of government, such as the *stadhouders*, tried, in most cases not very successfully, to intervene at the courts.⁴⁴ This situation was quite distinct from that in many other European states at the time, for instance in France or Prussia where the monarch’s *lettres de cachet* (imprisonment of individual judges) and *Machtsprüche* or *Kabinettsjustiz* (peremptory orders) became an increasingly attractive alternative means of control of the courts well into the end of the eighteenth century.⁴⁵

⁴² Huussen, *Bijdragen* 93 (1978), 249-250. See also the text above at 1 fn5.

⁴³ Fockema Andreae, *Staats- en Rechtsleven*, 79 states: “*De voorheen monarchale gerechtshoven, dor de instelling der nieuwe Staten-organen van nagenoeg al hun bestuurs- en wetgeversfuncties ontheven, zagen zich bepaaldelijk op de rechtspraak geconcentreerd en in een zekere tegenstelling tot de wetgevende en besturende organen gebracht. Feitelijk was de onafhankelijkheid dezer rechtscolleges in hoge mate verzekerd.*” Further see Huussen, *Bijdragen* 93 (1978), 250.

⁴⁴ Van Deursen, *Het Koppergeld*, 167-168.

⁴⁵ Dawson, *Oracles*, 250-257 and 365-366. Van Poelgeest, *Bijdragen* 103 (1988), 47-49 includes an interesting detail with regard to what he calls a “...*milde, republikeinse vorm van 'Kabinettsjustiz'...*”. He points to the so-called *justitiebesogne* of the province of Holland, a body that consisted of 11 representatives of the 10 most influential towns of the province, the *ridderschap* and the *raadspensionaris* of the Estates of Holland. The *justitiebesogne* exercised its jurisdiction in cases where parties were at loggerheads over the jurisdiction of the *Hoge Raad* in *politieke zaken*. One such dispute arose for instance in 1702 over the question of whether the King of Prussia or Johan Willem Friso, *Stadhouder* of Friesland, was entitled to the inheritance of the so-called Governor-King William III. On the surface a mere civil law suit was in the offing which clearly would have fallen within the jurisdiction of the *Hoge Raad*. Nonetheless, since it was evident that this question touched upon vital interests of the entire Republic the *justitiebesogne* decided to affirm the jurisdiction of the Estates of Holland. However, Van Poelgeest also points out that during the eighteenth century the tendency of the Estates to interfere with the jurisdiction of the *Hoge Raad* declined dramatically. The last incident occurred in 1724, and in only 4 instances out of 22 did the *justitiebesogne* deny the jurisdiction of the *Hoge Raad*.

2.2 The lower courts

A confusing variety existed in the Low Countries with regard to naming, appointment, organisation and jurisdiction of the lower courts.⁴⁶

On the *platte land*, justice in the lower courts was administered by a *schout*.⁴⁷ Depending on the region, a *schout* was assisted by a number of *schepenen* or an *azing*. The court of the *schout* had jurisdiction in cases of minor offences as well as in actions for money or debt. From these courts of first instance, appeal was possible to the committee of *baljuw en mannen* or *drost en mannen* or directly to the *hof* of the province.⁴⁸ The court of the *baljuw* or *drost* had first instance jurisdiction within the *baljuwschap*, as well as in cases relating to succession, land and feudal law.⁴⁹ In the towns, the law was administered by *baljuw en schepenen* or *schout en schepenen* or *gezworenen*. In addition, the more influential towns, namely Amsterdam, Leiden, Rotterdam and The Hague, established inferior town courts. These were instituted either with special jurisdiction or with jurisdiction in respect of small claims. Furthermore, there existed a large number of special courts such as feudal, forest (*houtvester ende meesters-knappen*), dyke (*dijkgraaf ende hoge heemraden*), tax (*schepenen commissarissen*), water, guild and market courts.⁵⁰

2.3 Professionalism and legal education

The trend towards legal professionalism which began to prevail from the fifteenth century, at least in the superior courts, was the second important aspect of the development of the judicial system of the Netherlands.

The developments that led to the replacement of the traditional rulers' *curiae* as royal law courts by a body of professional councillors who adjudicated simply by means of delegation

⁴⁶ For an overview see Van der Linden, *Judicieele Practijcq*, I.4.

⁴⁷ Merula, *Manier van Procederen*, I.6.1.13 (2).

⁴⁸ *Ibid.* at (2) [e] and [f].

⁴⁹ See Dolezalek, *Zivilprozessrecht*, 68 and the authorities cited; Hahlo and Kahn, *Legal System*, 475.

⁵⁰ Dolezalek, *Zivilprozessrecht*, 68-69.

have been touched upon elsewhere.⁵¹ As, for instance, in Italy from the twelfth century onwards, the judges of the various *hofe* as well as of the *Hoge Raad* had to be doctors of law or at least licentiates in law. The *Instructie van de Hof van Holland* (1531) required that the court consist of a president and eight councillors who had all to be professionally trained lawyers.⁵² Moreover, the list of *raadshere* of the *Hof van Holland* included such well-known names as Nicolaus Everhardus, president of the court from 1509-1528⁵³; Pelgrim van Loo, a distinguished judge from 1576-1587⁵⁴; and Johann Loenius, judge at the court from 1621-1641.⁵⁵ Other famous officers of the court were none less than the great Hugo Grotius, who acted as *advocaat-fiskaal* from 1607-1614, and Willem van Alphen, who acted as secretary of the court from 1631-1681.⁵⁶

The *Hoge Raad* consisted of a president and ten trained councillors who held office for life.⁵⁷ Members of this court included Cornelius Neostadius (1584-1606), Jacob Coren (1621-

⁵¹ See above at 1. De Schepper and Cauchies, *Legal Tool*, 250-251 make the point that the rulers only occasionally continued to take an active part in the administration of justice. An exception to the rule was the famous case of the trial of the counts Egmont and Horn who, together with William of Orange, were the leaders of the revolt against the Spanish-Habsburgians and, in 1568, were sentenced to death by Philip II roughly a year before their arrest and trial.

⁵² De Blécourt and Fischer, *Kort Begrip I*, 430. Merula, *Manier van Procederen*, 1.6.1.13 (2) mentions “*Personen uit de beste en Geleerdste, mitsgaders ervarenste...*”.

⁵³ Author of the *Responsa sive consilia*, see for more details Roberts, *Bibliography*, 116 and Dekkers, *Bibliotheca*, 53; De Vos, *Regsgeskiedenis*, 164; De Wet, *Ou Skrywers*, 114.

⁵⁴ See Roberts, *Bibliography*, 194 and Dekkers, *Bibliotheca*, 103; Van Zyl, *Geskiedenis*, 323 and 371; De Vos, *Regsgeskiedenis*, 170; De Wet, *Ou Skrywers*, 180.

⁵⁵ Author of another collection of decisions titled *Decisien en Observatien* (1721) see Roberts, *Bibliography*, 194 and Dekkers, *Bibliotheca*, 102; De Wet, *Ou Skrywers*, 141; De Vos, *Regsgeskiedenis*, 222 and Van Zyl, *Geskiedenis*, 376-377.

⁵⁶ With regard to Grotius see for more details below 4.3. On W van Alphen note Roberts, *Bibliography*, 34 and Dekkers, *Bibliotheca*, 3; De Wet, *Ou Skrywers*, 137; De Vos, *Regsgeskiedenis*, 181; Van Zyl, *Geskiedenis*, 381.

⁵⁷ Hahlo and Kahn, *Legal System*, 542.

1631),⁵⁸ the eminent Cornelis van Bynkershoek, judge from 1704-1743 and the court's president from 1724 until his death⁵⁹, and the latter's son-in-law, Willem Pauw.⁶⁰

Relatively recent studies, for instance for the *Raad van Brabant*, have shown that from as early as the second half of the fifteenth century, up to the year 1600, the percentage of councillors of the *Raad* with a university law degree never dropped below 66%. From 1525 onwards, the percentage was never less than 95%.⁶¹ Most councillors with a university degree had studied either canon law or Roman law or both at Louvain (82,4 %), Orléans (25%) or Bologna (10,5%).⁶² The same pattern prevailed in the superior courts of the northern provinces. However, with the emergence of the first Dutch universities at the end of the sixteenth century, many judges were graduates of a local university.⁶³ By the end of the eighteenth century, most superior judges, even in the remote and undeveloped areas of the northern Low Countries, were holders of a doctorate of law.⁶⁴

⁵⁸ As collectors of important court decisions of the *Hoge Raad*, both authors are predecessors of Cornelis van Bynkershoek and his son-in-law Willem Pauw. Neostadius (Cornelis Mathiasz van Nieustad) published a collection of court cases in his *Utriusque Hollandiae, Zelandiae et West-Frisae curiae decisiones* (1617) on which see De Smidt, *Hoge Raad*, 209; see also Roberts, *Bibliography*, 224. Further Van Heijnsbergen, *Geschiedenis*, 98. Jacob Coren is well known for his *Observationes XLI rerum in supremo senatu Hollandiae, Zelandiae et Frisae judicatarum* (1633). Note Roberts, *Bibliography*, 89. See also Van Heijnsbergen, *Geschiedenis*, 98. For further references see Zimmermann, *RHR*, 21-22; De Wet, *Ou Skrywers*, 133 (Coren) and 126 (Neostadius); De Vos, *Regsgeschiedenis*, 170 (Coren) and 169-170 (Neostadius); Van Zyl, *Geskiedenis*, 321 and 324 (Coren) and 371-372 (Neostadius).

⁵⁹ He left his collection of cases titled *Observationes Tumultuariae* to Willem Pauw, which was published in this century in four volumes by Meijers *et al.* For his other important works, see Roberts, *Bibliography*, 68. For a brief biographical sketch and further references see Feenstra, *Van Bynkershoek*, 107. See further Zimmermann, *RHR*, 32-36; De Vos, *Regsgeschiedenis*, 200-204; Van Zyl, *Geskiedenis*, 367-370; De Wet, *Ou Skrywers*, 160.

⁶⁰ Pauw continued the work of his father-in-law in his *Observationes Tumultuariae Novae* edited by Fischer *et al.* For more references on Pauw, see Zimmermann, *RHR*, 22 and 35, De Wet, *Ou Skrywers*, 183; De Vos, *Regsgeschiedenis*, 202; Van Zyl, *Geskiedenis*, 369-370 and 407-408.

⁶¹ See the remarkable study by De Ridder-Symoens, *Conseil de Brabant*, 285.

⁶² *Ibid.* at 294.

⁶³ With regard to the situation at Flanders, Van Caenegem, *Historical Introduction*, 80 fn106 states: "....in the course of the sixteenth century legists [so called since they had studied at university the *leges* of the Roman emperors] became ever more numerous until they obtained a monopoly. At the *parlement*...and the Great Council...of Malines, all the councillors were doctors or graduates in law." The first Dutch universities were Leiden (1575), Franeker (1585), Groningen (1614), Leeuwarden, Utrecht (1636) and Harderwijk (1648). With regard to the emergence of legal university education in the Low Countries see *inter alia* Zimmermann, *RHR*, 22-24; as well as Coing, *Handbuch*, 58-59; Stein, *Römisches Recht in Europa*, 161-162. Enlightening are also the comments by Lademacher, *Niederlande*, 312-327.

⁶⁴ Van Poelgeest, *Bijdragen* 103 (1988), 25 states that two thirds of the *raadsheren* of the *Hoge Raad* held a doctorate from the University of Leiden, and about one fifth held a doctorate from the University of Utrecht; Dolezalek, *Zivilprozessrecht*, 65.

Most (43) of the 47 judges on whom Van Poelgeest based his research on the *Hoge Raad*, joined the Bar either at the *Hoge Raad* or the *Hof van Holland* before they were called to the Bench. Van Poelgeest states that an average of 15 years lay between the termination of university training and appointment to the Bench.⁶⁵ The *Hof van Friesland* had 12 *raadsheren ordinariis* who were appointed for life. The letter of commission generally spoke of *bekwaam en rechts-ervaren persoon*, though Huussen tells us that a candidate had, *inter alia*, to be a born Frisian or to have a Frisian wife or to have lived in Friesland for 20, later 10, years. The candidate also had to be a protestant (*ware gereformeerde religie*) and a doctor or *licentiaat* of law as well as a matriculant of the Bar of the *Hof van Holland*.⁶⁶ Given the ability and knowledge of the judges, the application of the law in the higher courts of the Low Countries was, understandably, at a high level.

While much was expected of the judges, the situation that prevailed in the lower courts was very different from that at the superior courts. The seventeenth and eighteenth century local judges in the Low Countries are referred to in the Latin legal literature as *iudex* but also as *rechter* or *magistraet*. These local judges held an honorary (i.e., unpaid) public office and administered the law in the name of the province or the cities.⁶⁷ In this respect they must be distinguished from the Roman *iudex* or the Italian foreign *iudex*. In addition, the term *magistraet* in its administrative meaning of a member of a local municipal council of a Dutch town must be distinguished from *magistraet* in its judicial context as a member of the court of *baljuw en schepenen* or *schout en schepenen*.⁶⁸

⁶⁵ Van Poelgeest, *Bijdragen* 103 (1988), 25.

⁶⁶ Huussen, *Bijdragen* 93 (1978), 256.

⁶⁷ Voet, *Commentarius*, 5.1.39; Huber, *Heedendaegse Rechtsgeleertheit*, 2.1.15.6: "...door publieke autoriteit gestelt...". And at 22 he states: "...worden...alle Rechters hooge of leege...onder dese beschrijvinge beklemt." Quoting from Huber's *Heedendaegse Rechtsgeleertheit* the first time makes it necessary to point to fact that the original work consisted of two separate parts, with three titles each. P. Gane based his translation in *The Jurisprudence of my Time* on the fifth edition, where both parts (and thus all six titles) were included in one book. Thus, the title numbers are different: for instance 2.1.15.6 (vol.II, title 1) of the Leeuwarden (1686) edition is 4.15.6. in Gane's *Jurisprudence of my Time*. Since I have quoted from both works it is important to keep this in mind. With regard to the requirements, both theoretical and factual, of the offices of local and national government see Van Deursen, *Het Koppergeld*, 159-161 and Lademacher, *Niederlande*, 201-215.

⁶⁸ Van Zurck, *Codex Batavus*, 'Magistraten' 3.5 n.2. See also Groenewegen, *Tractatus*, C.1.55.3 and 6; Wessels, *History*, 163.

In contrast to the situation in the Italian towns (where the entire judiciary, whether inferior or superior, local or foreign, had from the twelfth century onwards to have at least a law degree requiring a minimum of four to five years of study at a law school), hardly any of the inferior judges in the Low Countries had ever read for a degree.⁶⁹ With regard to the earlier periods, B H D Hermesdorf wrote of the judiciary in the Low Countries:

*“Toch stelle men zijn verwachtingen omtrent deze schepengeleerdheid niet al te hoog. We merkten al op dat geschoolde juristen in de schepenenbanken nog altijd een uitzondering vormen.”*⁷⁰

This applied to inferior judges in the sixteenth and seventeenth centuries alike.⁷¹ The towns elected their *baljuws* or *schouten* as well as the *schepenen* from the ranks of the burghers of the towns; but only for a term of one year.⁷² And even though there existed the practice, albeit to a smaller degree than in Germany, of calling on professors of law schools or renowned advocates for professional advice (*advysen*), not much experience and expertise could be gained from one year of judicial service.⁷³ In addition, the lower court judges were not only uneducated in law, but often had difficulty reading (legal) Latin, which had become increasingly important for the proper understanding and administration of the law of the Low Countries from the fifteenth century onwards. Although a number of important authors of Roman-Dutch law, beginning with Hugo Grotius, published some of their works in Dutch, Latin remained the language of the university-trained jurists well into the nineteenth century.⁷⁴

⁶⁹ Hermesdorf in his *Rechtsspiegel*, 142 refers to Jan Matthijssen and stated that Matthijssen concludes from the oath of the *schepenen* that: “...deze mensen ‘gheleerde luden’ moeten zijn al bedoelt hij daarmee geenszins dat ze een universitaire scholing achter zich moeten hebben.”

⁷⁰ *Ibid.* at 146.

⁷¹ See also Huber in his *Jurisprudence of my Time* at 4.15.18: “It is, however, a fact that certain [lower] judges are appointed without skill in the law...”

⁷² Van Poelgeest, *Bijdragen* 103 (1988), 24; Hahlo and Kahn, *Legal System*, 476; see also Van Zurck, *Codex Batavus*, ‘Magistraten’ 3.5 n.6, where it is said that no burgher might excuse himself from the office of *schepenen* without acceptable reason which bears similarities to the situation at the time of the Roman republic, for which see above at chapter II 1 3. See further Groenewegen, *Tractatus*, C.1.55.3.

⁷³ Van den Bergh, *Gerard Noodt*, 283-284 and see below at fnn254-257. For the development of the *Aktenversendung* in Germany see *inter alia* Woeste, *Akademische Väter als Richter*, 9-14 (University of Marburg); Baumgärtel, *Gutachter- und Urteilstätigkeit*, 12-32 (University of Erlangen); Geipel, *Konsiliarpraxis*, especially 3-35 (University of Tübingen); more generally Kern, *Gerichtsverfassungsrecht*, 36-38. Further note Dawson’s comments, *Oracles*, 196-213.

⁷⁴ On Grotius and the publication of his *Inleidinge* in Dutch, see De Smidt, *Expansion*, 181.

The medieval lay judge used to 'find' the correct customary law in medieval case books and then apply it to the case.⁷⁵ However, from the sixteenth century onwards, professional commentaries on customary law became increasingly authoritative. In a number of cases these commentaries were written by persons who had at some time been law professors, judges of the superior courts or even advocates. This new class of lawyers blended customary law with Roman law, which had gained the status in the Low Countries of a strong complementary source of law and increasingly replaced purely customary law.⁷⁶ In their works, these commentators paid particular attention to the practical legal questions of the age.⁷⁷ Indeed, this practical nature of Roman-Dutch law is considered one of its most important aspects.⁷⁸

Ulrich Huber, in his *Heedendaegse Rechtsgeleertheit*, states that a judge had to be schooled in, first, the *gemein* and, secondly, the *bysonder recht*. This meant that a judge needed to know: "...eerstelyk het Rooms-recht, ende ten tweeden de Ordonnantien van Frieslandt...".⁷⁹ Needless to say, most lower court judges experienced severe problems with the vast, growing, complex and partly obscure legal material of Roman law. Taking all this into account, it is hardly surprising that the eminent Cornelis van Bynkershoek, well known for his acid criticism⁸⁰, said of the judges of the lower courts that they "...are often as incompetent to give decisions as an ass to play on the lyre."⁸¹

Thus, a split image emerges of the professionalism of the Dutch judiciary up to the late eighteenth century. The high degree of knowledge and expertise of the judges of the superior provincial courts contrasts sharply with that of the typical judge of the lower courts, who was

⁷⁵ For a raging discussion on the 'humanity' and the training of medieval and late medieval Dutch magistrates see De Mayer and Van den Elzen, *TR* 53 (1985), 347.

⁷⁶ Hahlo and Kahn, *Legal System*, 516 state: "As in Germany, so in Holland, Roman law was applied as subsidiary common law...In practice Roman law played a far greater part than its status as a subsidiary common law may be thought to have warranted." See De Vos, *Regsgeschiedenis*, 147-161; Wille's *Principles of South African Law*, 20-22; Wesenberg and Wesener, *Privatrechtsgeschiede*, 71-72.

⁷⁷ Van Caenegem, *Historical Introduction*, 9-10. Further see De Vos, *Regsgeschiedenis*, 162-163; Hahlo and Kahn, *Legal System*, 546-562. For the growing influence of Roman law in the decisions of the *Groote Raad*, see Reinsma, *TR* 34 (1966), 600-603.

⁷⁸ For further detailed references to the development of Roman Dutch law as a *jurisprudentia forensis* see Zimmermann, *RHR*, 51-58 and 1990 *JZ*, 834 *et seqq.*

⁷⁹ Huber, *Heedendaegse Rechtsgeleertheit*, 2.1.15.13.

⁸⁰ See Zimmermann, *RHR*, 34.

⁸¹ My translation from Van Bynkershoek's *Quaestionum Juris Publici*, 1.2.12.

anything but a trained jurist and was selected for office on the basis of superior status rather than legal training.

3 DEVELOPMENTS IN THE LAW OF DELICT AS A BACKGROUND TO JUDICIAL LIABILITY

With regard to developments in the law of delict relevant to the question of judicial liability, three aspects require specific attention. Of these the first is the general development of the three relevant actions, namely the *actio legis Aquiliae*, the *actio iniuriarum* and the *actio de dolo*. Attention will then be paid to the development of the terms *dolus* and *culpa*. Finally, the position of the group of quasi-delicts in Roman-Dutch law will be assessed.

The Aquilian action of early Roman-Dutch law was considerably different from the *actio legis Aquiliae* of the *Corpus Iuris Civilis*. As we have seen, the latter was an *actio mixta* in that it had both penal and reipersecutory characteristics.⁸² By the end of the Middle Ages, however, the penal aspect of the action had declined in importance.⁸³ This was in line with the general position in the *ius commune*, where the old *delicti privata*, though received in all systems except the French, had begun to shed their penal characteristics.⁸⁴

The reasons for the decline in importance of the penal aspects of the *delicti privata* appear to be threefold. Firstly the incorporated system of fixed fines (*duplum*, *quadruplum*, etc) within the *delicti privata* contradicted an established principle in the *ius commune*: “*Hodie omnes poenae sunt arbitrarie*”. This meant that it was at the judge’s discretion to reduce or to increase a sentence according to the circumstances of the case.⁸⁵ Secondly, fixed fines were also contradictory to the principle in canon law whereby an injured party was permitted to

⁸² See above at chapter IV 2 fn128.

⁸³ For an excellent overview on the course of development, see De Wet, *Liability for Wrongful Conduct*, 149 *et seqq.* See also Zimmermann, *Law of Obligations*, 918 *et seqq.*, 969 *et seqq.* and 1019 *et seq.*

⁸⁴ With regard to the autonomous development in France where the *actiones poenales* were not accepted at all and thus delicts which were part of the *delicti privati* were pursued only by means of public criminal procedure, see Coing, *Europäisches Privatrecht*, 506-507 and Dumas, *Histoire des Obligations*, 33 *et seq.*

⁸⁵ Coing, *Europäisches Privatrecht*, 504 fn5 with further references.

receive compensation only for the actual loss suffered and not beyond.⁸⁶ Thirdly, it seems that the growing evolution of governmental disciplinary power had led to exclusive prosecution in public criminal trials of most of the infringements also covered by the penal side of the *delicti privata*.⁸⁷ Parties could choose between public and private procedure, but for various reasons invariably opted for criminal procedure. The *actio rei persecutoria*, however, remained available after either of the two other procedures. Hence, in practice, the compensatory character was the only remaining feature of the *delicta privata*.⁸⁸ According to Professor Coing, the transformation from *actiones poenales* or *actiones mixta* to exclusive *actiones rei persecutoriae* was complete by the seventeenth century.⁸⁹

This was also the case in Roman-Dutch law. T J Scott in his thesis on the historical development of the transmissibility of delictual actions in South African law has shown in detail how this process took place in the Netherlands. According to him, French rules of practice, which had been strongly influenced by canon law, played a decisive role in the Netherlands. Petrus Gudelinus (1550-1619), a writer from the Spanish Netherlands, inspired by the French practitioner Jean Imbert, was one of the first to point out that the system of *poena privata* was no longer applied in the Dutch provinces.⁹⁰ Writers from the northern provinces often referred to Gudelinus.⁹¹ There was also frequent reference to Hugo Grotius, who stated at the end of his *Inleidinge* at 3.32.7:

“...the prosecution of crimes has almost entirely come into the hands of the Count and his officers...However, although the same person is frequently entitled to something as compensation and also to something as penalty and although both of these are frequently included under one word, nevertheless they must for many reasons be distinguished one from another.”⁹²

⁸⁶ According to Coing, *Europäisches Privatrecht*, 504. See also De Wet, *Liability for Wrongful Conduct*, 181.

⁸⁷ Coing, *Europäisches Privatrecht*, 504-506. De Wet, *Liability for Wrongful Conduct*, 180.

⁸⁸ For a comprehensive study of the development of Aquilian liability in the German *usus modernus*, see the work by Kaufmann, *Actio Legis Aquiliae*.

⁸⁹ Coing, *Europäisches Privatrecht*, 510.

⁹⁰ Gudelinus, *Commentarii de Iure Novissimo*, 3.13: “Sed observandum est poenas istas pecuniarias dupli, tripli, quadrupli, iure Romano constitutas, moribus exolevisse; relicta tantum privatis, ejus quod sibi ex bonis abest, seu quod sua interest, iudicio civili persequendi facultate, fisco solo poenas ob vindictam publicam iudicio criminali persequente.” With regard to Gudelinus see Roberts, *Bibliography*, 144.

⁹¹ For instance Vinnius, *Ad Institutionum*, 4.3.9.

⁹² Grotius, *Inleidinge* (1926).

Simon Groenewegen van der Made observed: "The action under the *Lex Aquilia* is not penal nowadays, but reipersecutory...".⁹³ Antonius Matthaeus II commented in his *De Criminibus*: "Finally it must be noted that present day [criminal] practice has almost entirely given up the assessing of damage as done by the *Lex Aquilia*."⁹⁴ And Johannes Voet in his *Commentary* stated: "However the rule has prevailed by our customs...action under the Aquilian law is no longer penal but is for the recovery of property...".⁹⁵

With the disappearance of the penal aspects of the *actio legis Aquiliae*, the action was soon considered passively transmissible. Even more significant was the extension, finally, of the *actio legis Aquiliae* to cover purely patrimonial loss, a field that used to be covered in Roman law exclusively by the subsidiary *actio de dolo* in the event of damage inflicted *dolo malo*. It may be recalled that in Roman law patrimonial loss was recoverable only where it related to a specific corporeal asset in the possession of the plaintiff. Already at the time of the Commentators the emergence of the doctrine of *interesse* resulted in a cautious tendency towards extending the application of the *actio legis Aquiliae*, or at least the *actio in factum*, to instances where the plaintiff had suffered patrimonial loss without loss or damage to any particular item of his property.⁹⁶ But since it was now widely accepted that no practical distinction existed between the extended *actio in factum* and the *actio legis Aquiliae*, the Aquilian action was certainly on its way towards becoming a general comprehensive remedy for the recovery of damages for all patrimonial harm caused with *dolus* or *culpa*.⁹⁷

What was the relation of the *actio legis Aquiliae* to other delictual actions? Of particular interest to us is the relation to the *actio de dolo*. In Roman law, no concurrence of the two actions was possible since the *actio de dolo* was subsidiary to the *actio legis Aquiliae*. Furthermore, in cases involving damage to property, the *actio de dolo* was available only if the damage was committed *dolo malo*.⁹⁸ It is evident that as long as the Aquilian action was restricted to damage to property, there was room for the *actio de dolo*. Once the Aquilian

⁹³ Groenewegen, *Treatise*, 4.3.15.

⁹⁴ See *On Crimes*, 47.3.4.

⁹⁵ 9.2.12.

⁹⁶ See the text above at chapter IV 2 fn128.

⁹⁷ For details and further references see below at 4 4 fnn320-324.

⁹⁸ Kaufmann, *Actio Legis Aquiliae*, 105-106.

action began to move into the field of pure economic loss, there was little room for the *actio de dolo* – especially in view of its subsidiary nature.⁹⁹

As regards the *actio iniuriarum*: the Aquilian action and the *actio iniuriarum* were undoubtedly considered concurrent since the former came to be considered purely reipersecutory, whereas the latter remained a private penal action. In brief, it appears that the *actio iniuriarum* in Roman-Dutch law to a large extent resembled that in Roman law, particularly the law presented by the Glossators and Commentators.¹⁰⁰ In Roman-Dutch law, *iniuria* continued to have two meanings: the general meaning of any legal wrong and the more specific meaning of contumelious conduct.

Arnoldus Vinnius states that: “...*iniuria est omne dictum factumve ad contemptum, infamiam, aut dolorem alterius directum.*”¹⁰¹ Simon van Leeuwen understands *iniuria* as a delict where something is done or said with injurious intention.¹⁰² Huber makes the point: “Injury is a crime deliberately committed with the effect of bringing another into ridicule and contempt.”¹⁰³ Dionysius Godefridus van der Keessel in his *Praelectiones ad Ius Criminale* considers an *iniuria* as “...every act, or statement, committed with wrongful intent to cause insult, dishonour, contempt or distress to another.”¹⁰⁴ Voet, more precisely, defines it as a “...wrongdoing committed in contempt of a free human being, and by which his person or dignity or reputation is injured with evil intent.”¹⁰⁵ Generally speaking, authors considered *corpus*, *fama* and *dignitas* to be legally protected interests.

An *iniuria* was committed either by acts (*re*), words (*verbis*) or writing (*litteris*).¹⁰⁶ However, some authors deviated from or supplemented this scheme.¹⁰⁷ *Iniuria* by act generally

⁹⁹ *Ibid.* at 109.

¹⁰⁰ Recent works with regard to the reception of the *actio iniuriarum* in Roman-Dutch law include *inter alia*: Zimmermann, *Law of Obligations*, 1062 *et seqq*; Ranchod, *Foundations*, 62 *et seqq*; Pauw, *Persoonlijkheidskrenking*; 59 *et seqq*; Walter, *Actio Iniuriarum*, 64 *et seqq*; Davidtsz, *Animus Iniuriandi*, 132 *et seq*; Burchell, *Law of Defamation*, 10 *et seqq*.

¹⁰¹ Vinnius, *Ad Institutionum*, Inst.4.4.pr.

¹⁰² Van Leeuwen, *Censura Forensis*, I.5.25.1. However, it ought to be noted that Van Leeuwen follows Grotius's approach rather than the classical Roman law position. See also Van Zyl, *Geschiedenis*, 359.

¹⁰³ Huber, *Jurisprudence of my Time*, 6.8.1.

¹⁰⁴ Van der Keessel, *Praelectiones ad Ius Criminale*, 47.10.1.

¹⁰⁵ Voet, *Commentary*, 47.10.1. See also Davidtsz, *Animus Iniuriandi*, 164.

¹⁰⁶ Huber, *Jurisprudence of my Time*, 6.8.13 or *Heedendaegse Rechtsgeleertheit*, 2.3.8.13; Van der Keessel, *Praelectiones ad Ius Criminale* 47.10.2; Van Leeuwen, *Censura Forensis*, I.5.25.7.

involved the physical infliction of harm¹⁰⁸ by beating or wounding, but also covered numerous other acts; for example:¹⁰⁹ the restriction of an individual's freedom by false imprisonment; the vexatious institution of court proceedings; obscene gestures or negative caricatures or plays; forcible entry into another's house or property; and acts directed against the honour and the reputation of females. *Iniuria* by words could be inflicted by making defamatory statements about someone, including the singing or recitation of defamatory songs or poems.¹¹⁰ *Iniuria* by writing included any written statement published *animo iniuriandi*.¹¹¹ *Iniuriae* by writing were considered more serious than *iniuriae* by words.¹¹² As a private penal action, the *actio iniuriarum* prescribed after one year.¹¹³

So far in this section, only occasional reference has been made to *dolus* or *animus iniuriandi* and *culpa* as subjective requirements for liability. From the content of earlier chapters, it is predictable that this aspect continued to play a considerable role in Roman-Dutch law of judicial liability. The process that led to the extension of Justinian's general system of culpability (in the sense of fault) during the age of the Glossators and Commentators has been discussed earlier.¹¹⁴ As described, *dolus* was considered to consist of *dolus verus* (*manifestus*) and *dolus praesumptus*, whereas *culpa* (in the narrow sense of negligence) consisted of *culpa lata*, *culpa levis*, *culpa levissima*. This notion was widely accepted in Roman-Dutch law.¹¹⁵ Franciscus Kersteman in his *Rechtsgeleerd Woorden-Boek* concluded that *culpa* "...woord verdeeld in drie soorten te weeten lata, levis en levissima."¹¹⁶ Diodorus Tulden in his

¹⁰⁷ For instance Voet, Voet, *Commentarius*, 47.10.7 somewhat unhappily added an *iniuria consensu*. See also Zimmermann, *Law of Obligations*, 1065. Matthaeus, *De Criminibus*, 47.4.1.1 included *iniuriae gestus obscenus* and *per picturam*. See for further comments Walter, *Actio Iniuriarum*, 76 fn67.

¹⁰⁸ Van Leeuwen, *Censura Forensis*, 1.5.25.7. See also Voet, *Commentarius*, 47.10.7; Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.2 *ad corpus*; Huber, *Jurisprudence of my Time*, 6.8.14 or *Heedendaegse Rechtsgeleertheit*, 2.3.1.14.

¹⁰⁹ For details and a very useful arrangement, particularly of Voet's comments, see the work by Walter, *Actio Iniuriarum*, 76-83.

¹¹⁰ Voet, *Commentarius*, 47.10.8 or Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.2 *ad existimationem*.

¹¹¹ For more details see Walter, *Actio Iniuriarum*, 81-83; Ranchod, *Foundations*, 73-74 both with vast references to other primary and secondary sources.

¹¹² Schrassert, *Practicae Observationes*, Cons. 23.45; Van Leeuwen, *Censura Forensis*, 1.5.25.9.

¹¹³ Van Leeuwen, *Rooms-Hollands-Regt*, 4.37.3; Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.19.

¹¹⁴ See above chapter IV 2 fn119 *et seqq.*

¹¹⁵ See for instance Voet, *Commentarius*, 9.2.13; Van Leeuwen, *Censura Forensis*, 1.5.1.3-4 and *Rooms-Hollands Regt*, 4.32.1.

¹¹⁶ Kersteman, *Aanhangzel Rechtsgeleert Woorden-Boek*, 'Culpa', 223 *et seqq.*

commentary on the *Institutes* refers to it.¹¹⁷ Johannes Jacob Wissenbach in his *Exercitationum*, under the heading *ad regula juris*, makes a general analysis of the law on *dolus* and *culpa*.¹¹⁸

Acting with *dolus verus* or *dolus manifestus* was, undoubtedly, the most severe case of judicial misconduct. However, it appears that *dolus verus* was no longer considered *dolus malus* in the sense of fraud or particularly reprehensible conduct. On the contrary, a multitude of terms appear from the various sources. Reference is made, *inter alia*, to *dolus* as prerequisite for certain crimes.¹¹⁹ Voet's definition of *dolus* in his commentary undoubtedly owes its inspiration to Labeo's classical definition of *dolus malus* in the sense of fraud¹²⁰, but he also makes reference to mere *dolus* without indicating fraud or *dolus malus*.¹²¹ In his *Beginnelsen des Rechts*, Voet mentions *bedrog* as having the meaning of *dolus*.¹²²

Van Leeuwen describes *dolus* as *animus et affectus delinquendi*¹²³, or, more narrowly, as "...*nec dolus, aut caliditas aliqua intercesserint*..."¹²⁴, or as *openlijk bedrog*.¹²⁵ Kersteman refers to *dolus* as *arglist* or *opzet*, which indicates either fraud or intention.¹²⁶ In the eyes of Van der Keessel, *dolus directus* exists where a person acts with *voluntas* and *animus necandi* whereas *dolus indirectus* requires merely *animus laedendi*. In cases of *dolus directus*, thus, the will of the culprit had to be directed at a specific result. Mere *animus laedendi* was indicative of the intention to injure someone.¹²⁷ Huber frequently refers to the terms *opzet*, *boos opzet*, *quaet opzet* or *bedroch*¹²⁸, as well as to *dolus*.¹²⁹ And Van der Linden makes the point that *boos opzet* lay where there was the intention to kill another person, when *imand zig*

¹¹⁷ *Ad Institutionum*, Inst.3.Cap 7, Tulden states: "*Culpa lata vero est negligentia vel imperitia quae cumque alteri damnosa & distinguitur in latam, levem, & levissimam*".

¹¹⁸ *Exercitationum*, Disp. 4.6-7.

¹¹⁹ Matthaeus, *De Criminibus*, Prolegomena 1.2.

¹²⁰ *Commentarius*, 4.3.1.

¹²¹ Voet, *Compendium Iuris*, 4.5 and his *Elementa Iuris*, 4.5.

¹²² Voet, *Beginnelsen des Rechts*, 4.3.6 and 4.5.1.

¹²³ *Censura Forensis*, 1.5.1.3-4.

¹²⁴ *Ibid.* at 2.1.8.9.

¹²⁵ *Rooms-Hollands Regt*, 4.32.1.

¹²⁶ *Aanhangzel Rechtsgeleert Woorden-Boek*, 'Dolus'.

¹²⁷ *Praelectiones ad Jus Criminale*, 48.8.3.

¹²⁸ *Jurisprudence of my Time*, 6.8.3 and *Heedendaegse Rechtsgeleertheit*, 2.3.3.3 and 2.3.3.5 and his *Beginzelen der Regtkunde*, 4.1.7.

voorgenomen heeft een doodslag te begaan, en dezelve op de voorgenome wijze ter uitvoer brengt...".¹³⁰ Furthermore, Dutch writers equated the term *animus iniuriandi*, which as we know frequently relates to the *actio iniuriarum*, with *intentie om te willen injurieren*¹³¹, with *oogmerk om te beledigen*¹³² or with *intentie om te injurieren*.¹³³ Obviously, *animus iniuriandi* was also equated with *opzet* or *dolus*.¹³⁴

In light of the foregoing, it must be asked what exactly constituted *animus iniuriandi* or *dolus*.¹³⁵ An acceptable overall view is that of Ranchod, who argues that in Roman-Dutch law *animus iniuriandi* was established only if two requirements were met: firstly, the defendant had to be aware of the wrongfulness of his acts and secondly, he must have acted with the intention to injure.¹³⁶

Besides the terms *opzet*, *intentie*, *animus iniuriandi* or *dolus*, there remains the term *dolus malus*. *Dolus malus* in Dutch had the meaning of *argelist*, *arglist* or *boos opzet* and indicated particularly fraudulent or reprehensible conduct, as was also meant by *dolus* in post-classical Roman law and by the Glossators and Commentators. Hence, from Roman-Dutch law onwards, we have a clearly divided meaning of *dolus*: the more general one of mere intention and the narrower one of fraud (*dolus malus*). One meaning, however, that was never attached to *dolus* or *dolus malus* in Roman-Dutch law was that of a bad motive. Thus, the Roman-Dutch jurists did not confuse the two issues of state of mind and the underlying motive. This conclusion is of considerable importance for the development of modern South African law.

¹²⁹ *Positiones Juris*, 4.5.2.

¹³⁰ *Regtsgeleerd Handboek*, 2.5.5, see also 2.16.2.

¹³¹ Kersteman, *Rechtsgeleert Woorden-Boek*, 'Injurie'.

¹³² Van der Linden, *Regtsgeleerd Handboek*, 1.16.4.

¹³³ Schomaker, *Selecta Consilia et Responsa Juris*, vol.II Cons.1.57.16.

¹³⁴ See also Pauw, *Persoonlijkheidskrenking*, 79 and 82-83 for a detailed overview.

¹³⁵ Some authors hold that mental elements did not play an important role. The discussion recorded in this footnote relates to the situation under the *actio iniuriarum*. From the aforesaid it seems feasible, however, to apply these principles to the question of *dolus* in general. For details see Walter, *Actio Iniuriarum*, 95 quoting De Villiers, *Law of Injuries*, 28; McQuoid-Mason, *Law of Privacy*, 101. Others hold that mere awareness of the wrongful nature of the conduct was not sufficient for *animus iniuriandi* but that in addition the intent to defame another was required. See Ranchod, *Foundations*, 75 interpreting numerous comments by the Roman-Dutch authorities to this effect.

¹³⁶ Ranchod, *Foundations*, 76-79 with reference to De Damhouder's *Practycke in Civile Saecken*, 123; Matthaeus, *De Criminibus*, 47.4.1.7; Voet, *Commentarius*, 47.10.20; Huber, *Praelectiones Juris Civilis*, Inst.4.4.1; Schomaker, *Selecta Consilia et Responsa Juris*, vol.V Cons.63.8.10 and 11; Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.1.

The threefold concept of *culpa* had also to be applied in assessing potential liability, including judicial liability. The rule *imperitia culpa adnumeratur* retained its validity.¹³⁷ Thus, generally speaking, any injurious inexperience or lack of skill or care on the part of a supposed expert led to liability.¹³⁸ However, this rule was not applied consistently to all experts or professionals. Groenewegen and Van Leeuwen were amongst the first to articulate the view that doctors and advocates were not invariably held responsible for lack of skill.¹³⁹ Somewhat literally, Groenewegen refers to the ‘earth’ which often enough covers the fatal consequences of doctors’ lack of skill in treating their patients. Likewise, with regard to the judge who acted with *imperitia*, he was to ask the crucial question of whether Roman-Dutch law accepted the notion that judges should be held liable for *dolus* and *culpa*, with which *imperitia* was equated.

The final aspect to be discussed in this section is the position of the group of quasi-delicts in Roman-Dutch law.¹⁴⁰ With reference to Roman law as it existed under Justinian, as well as to developments in the *ius commune* since the eleventh century, the Dutch jurists accepted the fourfold scheme of contract, quasi-contract, delict and quasi-delict. Accordingly, they followed in the main Justinian, who defined culpability as the cornerstone of delictual liability and who extended this principle, without too many scruples, to quasi-delictual liability. A distinction was drawn here between obligations *ex maleficio* and *quasi ex maleficio*.¹⁴¹ However, as in other countries, the category of quasi-delicts proved a major source of dissatisfaction for the Dutch jurists. Given their acceptance of the Justinian fault basis of quasi-delict, they found difficulty in justifying the retention of this category in the system of

¹³⁷ For more details see Scott, *Imperitia Culpa Adnumeratur*, 124 and 130-140.

¹³⁸ Particular attention was paid to doctors, advocates, craftsmen, muleteers, midwives and masters of ships. See Grotius, *Inleidinge* (1939), 3.33.5; Vinnius, *Ad Institutionum*, 4.3.7.8; Voet, *Commentarius*, 9.2.13 and 23; Huber, *Praelectiones Juris Civilis*, Inst.4.3.8.

¹³⁹ Groenewegen, *Tractatus*, 4.3.7.1 and 2; Van Leeuwen, *Rooms-Hollands Regt*, 4.39.4.

¹⁴⁰ With regard to quasi-delictual liability in Roman-Dutch law see Van der Merwe, *Verschuldensunabhängige Haftung*, 456-484; Pauw, *THR-HR* 42 (1979), 249. Further De Blécourt and Fischer, *Kort Begrip I*, 320; Feenstra, *Romeinsrechtelijke Grondslagen*, 162; Zimmermann, *Law of Obligations*, 17 *et seq* and 1126 *et seqq*; Godding, *Droit Privé*, 500-503. On the development of the quasi-delicts in the *ius commune* in general see Coing, *Europäisches Privatrecht*, 395 and particularly, of course, the work by Hochstein, *Obligationes ex delicto*, 70-93.

¹⁴¹ Grotius, *Inleidinge* (1926), 3.32.2; Van Leeuwen, *Censura Forensis*, 1.5.1.1; Van der Keessel, *Praelectiones ad Jus Criminale*, 3.32.2; Van der Linden, *Regtsgeleerd Handboek*, 15.1 and 6; Huber, *Jurisprudence of my Time*, 2.8.1, 2.8.3 and *Beginzelen der Regtkunde*, 4.1.6-8; Voet, *De Beginzelen des Rechts*, 4.5.1; Vinnius, *Ad Institutionum*, 4.5.

obligations. Why should there be quasi-delictual liability for *culpa* when the *actio legis Aquiliae* had emerged as the prototype of delictual liability for both *dolus* and *culpa*?¹⁴²

A remarkable interpretation was provided by Hugo Grotius. When analysing his explanations, however, we need to bear in mind that Grotius was a practitioner of natural law and that the concept of delictual liability as discussed in his works *De Iure Belli ac Pacis* and *Inleidinge tot de Hollandsche Rechtsgeleertheyd* was based on his theory of natural law. In Grotius's view, legal relations between individuals were regulated by the *ius civile*, i.e., positive law, which was the product of Roman law blended with Dutch customary law. However, the foundation of the positive law could be found only in the *ius naturale*, the system of law governed by objective reason. For an obligation to arise under the *ius naturale* required the free exercise of will.¹⁴³ Accordingly, Grotius formulated the following general proposition based on the will of the individual as the foundation of liability in the law of delict:¹⁴⁴

*"Maleficium hic appellamus culpam omnem, sive in faciendo, sive in non faciendo, pugnantem cum eo quod aut homines communiter aut pro ratione certae qualitas facere debent. Ex tali culpa obligatio naturaliter oritur si damnum datum est, nempe ut id resarciatur."*¹⁴⁵

Any wilful act or omission that was wrongful (not necessarily in the criminal sense) and directed against the property, life, body, dignity or freedom of another person, gave rise to delictual liability on the part of the wrongdoer.¹⁴⁶ Though he was influenced by the doctrine of *restitutio* and the Spanish moral-theologists Domenicus Soto and Diego Covarruvias, and most of all by Hugo Donellus, Grotius was the first to formulate such a general basis for the law of delict.

The requirement of wilful conduct or omission as the basis of liability implies that, as a matter of principle, there should be no liability without fault. Nevertheless, Grotius continued to differentiate in his *Inleidinge* between obligations arising from delict (*misdaed*) and

¹⁴² Zimmermann, *Law of Obligations*, 1126-1128; Van der Merwe, *Verschuldensunabhängige Haftung*, 460, 462 and 464.

¹⁴³ Grotius, *Inleidinge* (1926), 3.1.19.

¹⁴⁴ On the influence of Donellus on Grotius see Feenstra, *BIDC* 22 (1991), 342-343 and Hugues Doneau, 231 *et seqq.*

¹⁴⁵ *De Iure Belli ac Pacis*, 2.17.1.

¹⁴⁶ In his *Inleidinge* (1926), 3.33.1 Grotius refers to "...t'leven, t'lichaem, de vrijheid, de eer en de goederen." For more details on the general development of the law of delict under Grotius and the various influences on him, see Feenstra, *Quelques Remarques*, 74 *et seqq.* with numerous references. With particular regard to the development of the law of delict see Feenstra, *Deliktsrecht bei Grotius*, 429-436, also available in *Acta Juridica* 1 (1958), 27-29; see further by Feenstra, *Hugo Grotius*, 259; Zimmermann, *Law of Obligations*, 1032-1033; Benöhr, *ZSS (RA)* 93 (1976), 209-213.

obligations arising from quasi-delict (*misdaed door wet-duidinge*).¹⁴⁷ In 3.32.22 he attempted to explain quasi-delicts as follows:

“...the civil law, seeing that some wrongful acts, even though they have taken place, are difficult to prove, has, in certain cases, introduced obligations analogous to obligations arising from crime.”

Obviously, Grotius did not consider quasi-delicts as a genuine part of the superior *ius naturale*, but, rather, as a ‘lower’ form of liability. Quasi-delicts were thus of a somewhat makeshift nature, characterised by the fact that difficulties of proof necessitated a relaxation of the fault requirement: in the case of quasi-delicts, damage was simply attributed to a person, not arbitrarily but because of the relationship between himself and the person or thing that inflicted the damage. In view of the difficulty of establishing fault, the person was in a sense again presumed to have committed a delict.

According to 3.38.1, together with 3.32.22, of the *Inleidinge*, this difficulty of furnishing proof was recognised by the law as so-called *wettelijke oorzaecke*, i.e., as being sufficient for the arising of a quasi-delictual liability, the *misdaed door wet-duidinge*. Quasi-delicts, thus, were simply instances of damage being attributed to a person (*ex iusta causa*) who did not himself inflict the damage or where it was difficult to prove a culpable act or omission.¹⁴⁸ However, damage was not attributed to a person arbitrarily but only where that person stood in a particular relationship to the person or the thing that inflicted the damage.¹⁴⁹ Prime examples of quasi-delictual liability for Grotius were: the case of fire that originated in one person’s house and spread to other houses; the traditional quasi-delictual remedies except for the liability of the judge; the *actio de pauperie*; or – a frequent source of litigation in the Netherlands – collisions of unmanoeuvrable ships.

The liability of judges is not dealt with under subsection 38 but under subsection 37 of the third chapter of Grotius's *Inleidinge*, where he discusses wrongful acts against property, that is ordinary delictual liability. The reason for this was, as will appear in more detail below, that

¹⁴⁷ Grotius, *Inleidinge* (1926), 3.32.23; 3.38.

¹⁴⁸ Grotius, *Inleidinge* (1926), 3.38.1.

¹⁴⁹ Grotius, *Inleidinge* (1926), 3.38.1 and Van der Keessel, *Praelectiones iuris Hodierni*, 3.38.1; Schorer, *Aanteekeningen*, 3.38.2-8; Huber, *Beginzelen der Regtkunde*, 2.4.1.7 distinguishing between *eigentlyke* and *oneigentlyke misdaden*: “Ten 2. de eigentlyke zyn altoos feiten by de daders selfs begaen: de oneigentlyke zyn doorgaens feiten by andere begaen, ende die toegreeckent worden...”.

he considered a judge's breach of duty as genuinely culpable delictual conduct which was by its very nature unlawful and which obviously was not difficult to prove.

Grotius's theory, which appears to have been by far the most useful and satisfactory explanation of the category of quasi-delicts, was not accepted by all Roman-Dutch jurists.¹⁵⁰ By and large, it was followed only by those writers who used Grotius's *Inleidinge* as the basis of their own contributions or who wrote commentaries on Grotius's work.¹⁵¹ Most jurists belonged to the group that wrote commentaries on the use of Roman law in the Low Countries and more or less followed the classical presentation of the *Corpus Iuris Civilis*¹⁵², which hinged on the traditional conviction that, generally speaking, *dolus* was required for delicts and mere *culpa* was sufficient for quasi-delicts. This view is best articulated by Johannes Voet who states in his commentary at 27.7.6:

"...according to very familiar principles of the Civil law an action ... on quasi-wrongdoings could be available on the ground of slight or very slight negligence, and of ignorance, lack of skill and weakness without any fraud on the part of the person who was sued."¹⁵³

Some authors also used quasi-delicts as a convenient drip pan for other cases where damage had occurred without fault and was somewhat fortuitous, as in the case of liability under the *actio de pauperie*.¹⁵⁴

¹⁵⁰ Grotius's approach to the true character of quasi-delicts is considered by Hochstein as particularly remarkable. Grotius was the first author to find a convincing common dogmatic denominator for the different components of quasi-delicts since classical Roman law: To Hochstein, Grotius's view of the category of quasi-delicts gave rise to a liability which was of an objective rather than subjective nature and which was based upon the difficulty of submitting evidence. See Hochstein, *Obligationes Quasi ex Delicto*, 101.

¹⁵¹ Wessels, *History*, 279. See further the interesting outline by Jansen of the frequent use of Grotius's *De Iure ac Pacis* by Dutch law professors in the eighteenth century: Jansen, *TR* 55 (1987), 114. To this group belong writers such as S van Leeuwen, D G van der Keessel (in his *Theses Selectae* and *Praelectiones Iuris Hodierni*), J van der Linden, W Schorer or G Scheltinga.

¹⁵² To this group belong writers such as J Voet, A Matthaeus II, A Vinnius, U Huber, D G van der Keessel (in his *Dictata*).

¹⁵³ See further Van der Keessel, *Dictata*, 4.5.pr; Van Leeuwen, *Censura Forensis*, 1.5.30.1; Wissenbach, *Exercitationum*, 9.Disp.21.22; Huber, *Heedendaegse Rechtsgeleertheit*, 2.3.3 and 4: "...in de oneygentlijke misdaden is noit quaet opzet, maer alleen achteloosheit." See also Huber's *Beginzelen der Regtkunde*, 2.4.1.6-8. Voet states in his *Beginzelen des Rechts*, 4.5.1: "Misdaet door wetduiding in't gemeen is, welke niet uit bedrog of groot verzuim, maer uit eenige onkunde of onvoorzichtigheit voortkoomt...". Similarly in his *Elementa Iuris*, 4.5 and in his *Compendium Iuris*, 4.5: "Quasi delictum in genere est, quod non ex dolo vel lata culpa, sed aliqua sui aut suorum imperitia vel imprudentia oritur...". Vinnius, *Ad Institutionum*, 4.5 argued that quasi-delicts were not ordinary delicts but something closely alike: "Quasi maleficium est omne factum, quo quis proprie quidem dici non potest deliquisse, sed tamen quod maleficio est proximum." Further Feenstra, *Romeinsrechtelijke Grondslagen*, 162.

For the purpose of this thesis, it is essential to note that, according to the view of the majority of Roman-Dutch writers of the time, judicial liability was no longer considered a form of quasi-delictual liability. Although it is true that judicial liability was still often discussed in the commentaries under the rubric of quasi-delicts, the reason for this lay in the slavish adherence of most jurists, for the sake of tradition, to the Roman scheme of obligations. Only very few had the courage to choose a different form of presentation. That the majority of Roman-Dutch jurists excluded judicial liability from quasi-delictual liability, therefore, is not spelled out clearly anywhere; it is possible only occasionally to draw this conclusion from their discussion of relevant matters.¹⁵⁵ This is the logical conclusion to be drawn from the fact that the majority of Roman-Dutch jurists restricted the liability of judges to those cases where the judge had been actuated by *dolus*. In their view, *culpa* or *imperitia* were insufficient to establish liability, which can only mean that judicial liability was no longer considered to be quasi-delictual in character. It may be said, therefore, that for both Grotius and the more traditional Roman-Dutch school the approach of Placentinus (discussed earlier) had carried the day.¹⁵⁶ By the time of Roman-Dutch law, the category of quasi-delicts had been broken apart: judicial liability ceased to be considered a quasi-delict and became a true delict.

4 JUDICIAL LIABILITY FOR WRONG JUDGEMENTS: THE DIVERGENT OPINIONS OF ROMAN-DUTCH WRITERS

In what follows this pattern will be observed: those writers will be discussed first who restrict judicial liability to *dolus*, followed by those who advocate a more traditional view, namely liability for *dolus* and *culpa lata* or, as will appear from the discussion of Ulrich Huber's contribution, liability for every form of culpability. Finally, reference will be made to the

¹⁵⁴ Van Leeuwen, *Censura Forensis*, 1.5.31.2-10; Grotius, *Inleidinge* (1926), 3.38.10; Van der Keessel, *Praelectiones Iuris Hodierni*, 3.38.1 and 10. For a detailed analysis of Van Leeuwen's concept see Hochstein, *Obligationes Quasi ex Delicto*, 89-92. See further Van der Merwe, *Verschuldensunabhängige Haftung*, 457, 469-475 and 478-483 and Zimmermann, *Law of Obligations*, 1129 and fn251.

¹⁵⁵ For instance (not concluding) Van Leeuwen, *Censura Forensis*, 1.5.7.5 and *Rooms-Hollands Regt*, 4.33.10; Voet, *Commentarius*, 5.1.58.

¹⁵⁶ See above text at chapter IV 2 fn141 *et seqq.*

approach of Grotius, who, like Huber, favoured liability in all cases from *dolus* down to the slightest *culpa*. Grotius's reasoning, however, was very different from that of Huber.

Generally there exists no relevant passage by any of the Roman-Dutch jurists who deal with the issue of judicial liability on the question of what exactly was considered an actionable judicial wrong.¹⁵⁷ However, as in Italian medieval law, this appears to have required a culpable breach of a judicial duty, a wrong judgement in the broadest possible sense. Conceivable wrongs were misapplication or misinterpretation of laws, facts and basic legal principles of customary or Roman law or of Roman-Dutch law, as well as delay or denial of justice.¹⁵⁸ Judicial duty varied with the different judicial offices to be performed and the legal knowledge that had to be applied. Accordingly, when called to the bench, judges in the Low Countries had to take an oath which spelled out clearly what was expected of a judge.¹⁵⁹ In addition, privileges and *keuren* (local statutes) defined judicial duties. Reference in this respect should be made, for instance, to the famous *Privilegie van de Vrouw Maria* of 14 March 1476.¹⁶⁰

More generally Kersteman has stated in this regard:

“Op dat dan een Rechter syn ampt wel betrachte moet hy weten dat hem vyf dinghen meest te vlieden staen...Dese dan zyn Onwetenheyt, Liefde, Haet, Vrees ende Begheerte. Onwetenheyd die ghemeenlyck met onervarenheyt vergeselschapt is maeckt dat al will schoon yemandt recht oordeelen by't niet en kann doen uyt oorzsaecke syns onwetenheyds die nochtans een rechter niet en excuseert...”¹⁶¹

¹⁵⁷ The following more recent contributions provide for a general overview on the development of judicial liability in Dutch legal history: Van Zeben, *Onrechtmatige Daad*, 209-212; De Smidt, *Rechtspreken, Raadsheren en Rechtspraak*, 68-70; Hartog, *Onrechtmatige Overheidsdaden*, 18-23.

¹⁵⁸ *Consultatien*, 3.90.66: “Een Regter laedeert iemand wanneer by oordeeld tegens het regt of statuit.”; Voet, *Commentarius*, 5.1.20; *Uirechtsche Consultatien*, 3.25.15. and 3.87; Huber, *Jurisprudence of my Time*, 4.27.1-2: “Among others those inferior judges are liable to this, who often allow many weeks, or indeed months to pass without holding court days, by which all cases get into disorder and confusion.”

¹⁵⁹ See Merula, *Manier van Procederen*, 4.6.2. The passage on a corrupt judge (7) was highlighted and printed in bold letters in Merula's edition. See further De Damhouder, *Practycke in Civile Saecken*, 2.1-3 and 9.1-10 and Van Leeuwen, *Manier van Procederen*, 125-128.

¹⁶⁰ *Hant-Vesten ende Privilegien*, Art. 4, 6 and 7 in *Groot Placaet-Boek*, vol.II 660 *et seqq.* See also Groenewegen, *Tractatus*, C.3.1.14.pr. For numerous references to duties and the expectations made of judges in the late mediaeval period see Hermesdorf, *Rechtsspiegel*, 130-154.

¹⁶¹ Kersteman, *Rechtsgeleert Woorden-Boek*, ‘Rechters’. See also De Damhouder, *Practycke in Civile Saecken*, 9.5.

Finally, *exempla* like the *Judgement of Cambyse*s described in the Introduction served, even in legal manuals such as De Damhouder's *Practycke in Civile Saecken*¹⁶² or Matthaeus's *De iudiciis disputationes XVII*,¹⁶³ to admonish judges as regards their duties.

4 1 The majority view: liability for *dolus* only

4 1 1 Paulus Christianaeus

Paulus Christianaeus (1553-1631) was born at Mechelen.¹⁶⁴ After completing his legal studies in Italy, he practised as an advocate at the *Groote Raad* at Mechelen. For more than 30 years he also functioned as *syndicus (raadspensionaris)* of the city of Mechelen. Although he came from the Spanish Netherlands, Christianaeus was a well-known authority among Roman-Dutch writers and was frequently quoted by them.¹⁶⁵ The work for which he is best known is a collection of more than 1 300 decisions of the *Groote Raad* titled *Practicarum quaestionum rerumque in supremis Belgarum curiis actarum et observatorum decisiones*. This collection provides an in-depth view of the development of the law from the Glossators until the sixteenth century, with many references to Italian, French, Spanish and German authorities.

In the fourth volume of his *Decisiones Curiae Belgicae*, at 4.95, Christianaeus discusses various aspects of the liability of the judge under the title *De poena Iudicis qui malè iudicavit vel eius qui Iudicem vel adversarium corrumpere curavit*. It should be noted that Christianaeus was not discussing the question of judicial liability under the heading of quasi-delicts. Since his work was based on court decisions, it did not follow the scheme of the Institutes or the Digest. After summarising the position of the judge in the Institutes, he proceeds to analyse the legal position in his time. He refers to a comment by Budaeus on the increase in recent years in the number of cases where not only judges but also arbiters and witnesses had to make the case their own; in other words where they were sued for damages.

¹⁶² *Ibid.* at 2.14.

¹⁶³ Amstelodami, (1666). On the title page. See also De Smidt, *Rechtspreken, Raadsheren en Rechtspraak*, 69.

¹⁶⁴ As to more bibliographical details see Maes, *THR-HR* 12 (1949), 73; Roberts, *Bibliography*, 78; De Wet, *Ou Skrywers*, 120; Dekkers, *Bibliotheca*, 36; De Vos, *Regsgeskiedenis*, 167; Van Zyl, *Geskiedenis*, 339-340.

¹⁶⁵ See particularly De Wet, *Ou Skrywers*, 113.

Christianaeus's position with regard to the scope of judicial liability can be deduced from his comments at 4.95.1. Here he states clearly that a judge who *per imprudentiam* gave a bad judgement did not make the case his own: "*Sed si per imprudentiam male iudicet, non dicitur statim litem suam fecisse...*". On the other hand, the judge who acted with *dolus malus* could be held liable by a party.¹⁶⁶ Unfortunately, Christianaeus does not provide any detailed argument or justification for his statement.

At the very end of this passage, however, Christianaeus makes an interesting reference to the situation in France. He indicates that the French law of judicial liability appeared no longer to be based on Roman law, that is on the *iudex, qui litem suam fecit*. According to the well-known Frenchman Bernard Automne: "...*hic titulum recessisse a moribus nostris...*".¹⁶⁷ It is equally regrettable that Christianaeus did not take things further at this point since, as will be seen, French jurists had by far the greatest influence on the development of Roman-Dutch law in this regard.

4 1 2 Arnoldus Vinnius

Arnoldus Vinnius (1588-1657) was educated at the University of Leiden and became a professor at his *alma mater* in 1633.¹⁶⁸ Through his teacher Tuningius, Vinnius may be considered a second generation student of the great Hugo Donellus.¹⁶⁹ His most famous work is the commentary *In quatuor libros Institutionum Imperialium commentarius academicus et forensis*. This work was intended to be as much an academic textbook as a practical handbook and on the strength of it Vinnius is widely considered the first exponent of the so-called Dutch elegant school. Besides the original Roman text, he supplies the reader with a vast amount of information on the European *ius commune* as well as on important Dutch peculiarities. As far

¹⁶⁶ See, *Decisiones Curiae Belgiae*, 4.95.1: "...sed dumtaxat si dolo malo iudicavit ad fraudandam sententiam legis, ut uni parti fauet, & alteri noceat, & sic evidens argui potest eius vel gratia, vel inimicitia vel sordes...".

¹⁶⁷ (1587-1666), in his *Conferances du Droit Francais* with regard to the relevant passage in the Codex, that is ad titulum XLIX de poena iudicis qui male iudicavit.R.

¹⁶⁸ For more details see Smits, *Rechtsgeschiedenis*, 122; De Wet, *Ou Skrywers*, 133; Roberts, *Bibliography*, 314; Van Heijnsbergen, *Geschiedenis*, 53; Ahsmann, *Vinnius*, 638; Stein, *Römisches Recht in Europa*, 164-165; Zimmermann, *RHR*, 42 with further references; De Vos, *Regsgeschiedenis*, 180; Van Zyl, *Geskiedenis*, 353-354.

¹⁶⁹ With regard to the influences of the French elegant school on Vinnius see Van Warmelo, *Acta Juridica* 3 (1961) 45 *et seqq* and Beinart, *SALJ* 69 (1952), 157.

as the contemporary Dutch law embodied in his commentary is concerned, Vinnius relied strongly on Grotius and Christianaeus.¹⁷⁰ Numerous editions of Vinnius's commentary were published throughout Europe well into the nineteenth century.¹⁷¹ Other works by Vinnius are his *Tractatus de pactis, de jurisdictione, de collationibus, de transactionibus* (1646) and his *Jurisprudentiae contractae sive partitionem juris civilis libri IV* (1624).

Vinnius's opinion on the liability of the judge for a wrong judgement is to be found in his commentary on the Institutes under the title 4.5 pr. Following some general remarks on obligations arising from quasi-delict, he begins his comments with an explanation of the differences between the delictual liability of the *medicus* and the quasi-delictual liability of the *iudex*, the dogmatical problem that had earlier puzzled the Glossators and Commentators.¹⁷² As to the position of the law of his day, Vinnius comes to the clear conclusion that neither a doctor's error nor a judge's bad judgement made from ignorance or inexperience gave rise to any kind of liability.¹⁷³ Vinnius's main reason for this view is, apparently, that an injured party could always lodge an appeal against the decision of the judge. This opinion is strengthened by two of Vinnius's comments on the issue. The first follows immediately on the passage cited above: "...sed iniquitati sententiae occurrendum est remedio appellationis." And, a little further, he states that it was not unfair to a judge that in cases of wrong decisions *per imperitiam* the remedy of lodging an appeal was open to the parties:

"Ei, qui remedio appellationis utitur, quod hodie in casu proposito necessarium est, non est aequum adversus judicem, a quo appellavit, hanc actionem dari."¹⁷⁴

If he acted *dolo*, however, the judge committed a genuine delict¹⁷⁵ and would be held liable.

¹⁷⁰ With regard to the use of Christianaeus's collection of cases by Vinnius see particularly Meijers, *Grote Raad*, 170 and Stein, *Römisches Recht in Europa*, 164.

¹⁷¹ On the influence of Vinnius' works in Europe see Feenstra and Waal, *Seventeenth-Century Leiden Law Professors*, 81 *et seqq.*

¹⁷² See generally chapter IV 2 fn130 *et seqq.*

¹⁷³ *Ad Institutionum*, 4.5 pr: "Moribus hujus aevi neque errata medicorum in judicium vocari solent, ut alibi quoque notavimus; neque iudex et sententia sine dolo malo tantum per imperitiam prolata tenetur..."

¹⁷⁴ *Ibid.* at 4.5 pr 2.

¹⁷⁵ *Ibid.* at 4.5 pr 3: "Dolus judicis ut verum & infame delictum severius vindicatur: nam qui ... largitione, odio, vel gratia depravatus iniquam sententiam dixisse arguitur, & famae dispendium patitur, & veram litis aestimationem ei, quem laesit, praestare cogitur."

Vinnius was the first to introduce into Roman-Dutch law the 'appeal argument', as I call it, which was used by numerous other authors. He directed attention to at least four¹⁷⁶ French jurists as authority for his view on limited judicial liability *inter alia* Philibert Bugnyon¹⁷⁷, and Jean Papon.¹⁷⁸ These jurists are renowned, among other things, for their treatment of the *ius gallicum*, the French statute law and common law in force in sixteenth century France.¹⁷⁹

Of importance also is Vinnius's restriction of judicial liability to cases involving *dolus*, which indicates for the first time that the classical understanding of the liability of the *iudex, qui litem suam fecit* was no longer preserved as a form of quasi-delictual liability in Roman-Dutch law. Apparently, there was no room for judicial liability under the roof of quasi-delicts when such liability was limited to cases involving *dolus*.¹⁸⁰

¹⁷⁶ Information as to Eguinaire Francois Baron de Kerlouan (Baro) and Joseph Ludovici who were also referred to by Vinnius are rare.

¹⁷⁷ (1540-1590), Bugnyon, *Traicté des Loix Abrogées* states at 9-10: "Maintenant ilz ne font que le cerf de sciement mal iuger, usans de telz motz, Si gravaris, appella: bien assurez que le iuges superieurs ne les contraindront à soubstenir leur iugé, quod mutuas sibi praestent operas, & velut mutuo muli scabunt...Aussi le tiltre de conveniendis magistratibus D. n'est point usité: Et n'est permis à aucun recourir contre les juges pour leur mal iugé, ny pour la repetition de ses despens dommages et interestz, equelz on condamne seulement les parties qui plaident, sans avoir cause ny droit legitime ou sousesteenable, ains plustost par animosité calonie et audace, que autrement." And at 93 Bugnyon observes: "Poena legis Aquiliae Gallos, arbitrato iudicis irrogatur: ut si quis liber vulneratus sit. Nec sine dolo, vel culpa manifesta, mulcta ex hac caussa infligitur...Auiourd'huy, comme a desia este dict, tout le contraire se pratique, et ne fait on que intimer le juge qui a donne la sentence, de comparoir par devant le juge d'appel, s'il treuve que bon luy soit, ou que la matiere et cause d'appel le touche en aucune chose. Litis tamen omnes sumptus litigator sustinet, nisi iudex dolum, aut concussionem admiserit. En forte qu'on adiourne tousiours la partie. Et se void peu souvent, que combien que iudex dolo, culpa, vel propter inimicitias sententiam tulerit, in veram propterea litis aestimationem condemnetur, comme il seroit bien la raison, et le commande la glosse."

¹⁷⁸ (1505-1590), *Recueil d'Arrestz*, lib.6.2.13 and 21 and lib.19.1.22. The passages include no reference to liability for negligence or *imprudentia* except for liability in cases of avarice.

¹⁷⁹ See De Wet, *Ou Skrywers*, 87 fn40 and De Vos, *Regsgeskiedenis*, 90.

¹⁸⁰ See again above at 3 text following fn154.

4 1 3 Simon Groenewegen van der Made

Simon Groenewegen van der Made was born at Delft in 1613.¹⁸¹ He died in 1652, not yet forty years of age. According to a note by Professor Feenstra, Groenewegen was a distant cousin of Hugo Grotius.¹⁸² Groenewegen was educated at the University of Leiden and graduated with a doctorate in 1634. After a short period as an advocate in The Hague, he became secretary of his home town of Delft. Groenewegen is known for his commentary on Grotius's *Inleidinge*, published in 1644, but the work that really established him as one of the most important Roman-Dutch authorities is his *Tractatus de legibus abrogatis et iniusitatis in Hollandia vicinisque regionibus*, which was first published in 1649. And indeed Groenewegen set himself a gigantic task in this work: to examine every single chapter of Justinian's huge compilation in order to state which laws had been abrogated by disuse in the Netherlands.¹⁸³

4 1 3 1 Groenewegen's analysis

In Inst 4.5 pr., Groenewegen provides us with one of the most detailed analyses by a writer on Roman-Dutch law of the position of the law in the Netherlands with regard to judicial liability for misjudgements. From his comments can be gleaned the most enlightening information on the true foundations of Roman-Dutch law of judicial liability. Groenewegen's approach had a tremendous influence on his fellow writers and merits detailed attention.

Groenewegen strongly rejected the view that judicial liability for *imprudentia* prevailed in Roman-Dutch law in the seventeenth century. What he himself advocated was liability merely for *dolus malus*. He introduced two remarkable arguments to support his opinion.

His first argument in favour of restricted liability was derived from the *regula iuris* D 50.17.47: under the Roman law, an advisor could be held liable for his advice only where he had been actuated by *dolus malus*. Later, on the basis of this passage, the Glossators and Commentators advocated the view that legal advisors of judges and legal experts were liable

¹⁸¹ For more details see De Wet, *Ou Skrywers*, 135-136; Roberts, *Bibliography*, 137; Smits, *Rechtsgeschiedenis*, 127; Wessels, *History*, 301; Van Heijnsbergen, *Geschiedenis*, 106; Stein, *Römisches Recht in Europa*, 165; Zimmermann, *RHR*, 43-44; and in particular Beinart, *TR* 56 (1988), 333-340.

¹⁸² See Beinart, *TR* 56 (1988), *Addendum* at 340 at the bottom.

¹⁸³ For criticism see Zimmermann, *RHR*, 44.

at the *totale interesse* for giving fraudulent advice, not under the *actio legis Aquiliae* but under the *actio de dolo*. *Expressis verbis*, however, the Italian jurists rejected any analogy with the liability of judges under the *actiones legis Aquiliae* and *in factum*.¹⁸⁴ This notwithstanding, Groenewegen was the first Roman-Dutch jurist to apply *D* 50.17.47 to the liability of judges. He held that, like advisors and legal experts, judges should be held liable only for *dolus malus* under the *actio de dolo*.

Groenewegen's argument was that undue hardship would be inflicted upon judges, particularly inferior judges, if they:

"...in so difficult a science as that of the law and its practice, and amid so great a variety of opinions and such a multitude of cases that brook no delay...were subjected to risk in each single case in which anything perchance escaped them as a result of lack of knowledge or want of skill."¹⁸⁵

Accordingly, the liability of judges ought to be restricted exclusively to cases where they had acted *dolo malo*. Groenewegen was the first Roman-Dutch writer to thus introduce into the discussion the important legal policy argument against too wide a scope of judicial liability. He focused on the lack of judicial ability, education, experience and expertise. The sombre picture Groenewegen painted of the state of the judiciary in the Netherlands is in accord with that outlined in the introduction to this chapter. As we have seen, the growing influence of civil law made the dispensation of justice more and more difficult for the untrained lay judges who sat on the benches of the lower courts. Consequently, exemption of judges from liability for lack of knowledge or want of skill became, increasingly, a political issue.

It is this acknowledgement of the very real problems facing in particular the lower judiciary – problems that posed a serious threat to the administration of justice in the Low Countries – that distinguishes Groenewegen's reasoning from that of some of his less realistic fellow writers. The specific nature of Groenewegen's line of reasoning is particularly evident in comparison with preceding epochs. Groenewegen's argument convinced other writers and influenced legal opinion to such an extent that, thereafter, judges were held liable only for

¹⁸⁴ Engelmann, *Wiedergeburt*, 424.

¹⁸⁵ *Treatise*, Inst.4.5 pr.1. While Groenewegen refers to mistakes due to lack of knowledge or want of skill it is interesting to note that neither Groenewegen nor any of the other writers of Roman-Dutch law discussed the question of wrong judgements in the light of the doctrine of *error* or *ignorantia iuris*. Perhaps this doctrine did not square with the decided opinion of the majority of the Roman-Dutch jurists, i.e., that liability for wrong judgements at least given with *imprudencia non nocet*. For an exception see below at fn310.

dolus: which meant, in practice, that they were virtually exempt from civil liability for giving a wrong judgement.

It is more than evident that, with respect to the restricted scope of judicial liability, Groenewegen was influenced mainly by French jurists of the sixteenth century. The French authors he quotes are *inter alia* Baro¹⁸⁶, Bertrandus Argenterius¹⁸⁷, Bugnyon¹⁸⁸, Automne¹⁸⁹ and Charles Loyseau.¹⁹⁰ The fact that he also used two authorities from the southern provinces of the Netherlands, namely Franciscus Zypaeus¹⁹¹ and Paulus Christianaeus, as well as Vinnius, is further proof of the overriding influence of what may be called the French school of judicial liability.¹⁹² As said above, Christianaeus and Vinnius quote likewise from

¹⁸⁶ With regard to Baro see above at fn176.

¹⁸⁷ (1519-1590). I was unable to trace Argenterius's *Commentarii in Consuetudines Ducatus Britannie* (1664) in which I intended to cross-check Groenewegen's reference from his *Tractatus* in Germany. With respect to Argenterius see Holthöfer, *D'Argentré*, 149; Van Zyl, *Geskiedenis*, 218 and 224; De Wet, *Ou Skrywers*, 81; De Vos, *Regsgeskiedenis*, 89.

¹⁸⁸ For details see above at fn177.

¹⁸⁹ Apart from the comments of Automne to which Christianaeus referred to (above at fn167) he includes rich details as to the French *usus*.

¹⁹⁰ *Du Droict des Offices*, 1.14.31: "*Nous parlerons donc seulement des luges qui ont male iugé... Or est-il bien certain, que les luges ne sont pas garants regulierement de leurs jugement & que ut consilij, ita iudicij non fraudulentij, nulla obligatio est.*" And he continues to ask: "*Car parmy la varieté des affaires humaines, parmy le nombre infiny des loix, ordonances, & coustumes, parmy la diversité des opinions des hommes, parmy la malice des parties, parmy la negligence d'aucuns Advocats, parmy la surprise des Procureurs, parmy l'ignorance des Greffiers, qu'elle apparence y auroit-il, qu'un luge deust garantir tous les iugemens qu'il rend de saine consciences, & avec droite intention? & qui seroit celuy qui voudroit estre luge, pour estre au hazard d'avoir autant de procès en son nom, comme il donneroit de sentences, dont il n'en faudroit possible qu'un en toute sa vie pour le ruiner? Seroit-ce pas avoir tousiours en iugeant l'espee de Damocles pendue sur son chef.*" At 1.14.35 Loyseau makes the point that in contemporary French law (*nostre pratique*) a party may sue a judge only in cases of exhaustion of legal action: "*Car tant que la clause estoit entiere, & que le grief estoit reparable par appel, la partie n'avoit point de d'occasion de quitter la voye ordinaire de poursuivre son adversaire, pour s'attaquer à son luge, par une action extraordinaire.*" Loyseau admits that: "*Vray est que si en cause d'appel il se trouvoit que le luge eust notoirement failli, il pouvoit estre puny selon l'arbitrage du Superieur...*", but at the same time the judge does not make the case his own: "... *mais pourtant il ne faisoit pas la cause sienne, c'est à dire, qu'il ne transféroit pas sur soy l'evenement du procès.*" From the context of the foregoing passage and 1.14.34 it appears that Loyseau considers the French approach not congruent with Roman law: "*Il ya certains cas au droit Romain, esquels le luge fait la cause sienne...*", of which liability for corruption (1.14.37) or *imprudencia* (1.14.38) is restricted to inferior judges (*luges delegués*) since those are not '*gens d'espee*' or '*de lettres*' (1.14.39).

¹⁹¹ (1580-1630), *Notitia Iuris Belgici*, lib.2 'De appellationibus' n.18: "*In aliquibus locis, ut & in Gallia, Bugnion (leg.abrog.l.1.sat.208.) solet Iudex, qui pronuntiavit, tamquam qui litem suam fecerit, ad superiorem citari: quod alicubi adhuc obtinet, non ubique: sumptus tamen sustinet litigator, nisi ipse Iudex a dolo aut sordibus condemnatur.*" For further details as to Zypaeus see De Vos, *Regsgeskiedenis*, 168; De Wet, *Ou Skrywers*, 122 and Van Zyl, *Geskiedenis*, 339-340.

¹⁹² The influence of French writers on Groenewegen might also be drawn from the fact that most likely both the methodical approach (reviewing the practical application of the Roman law in the Low Countries) and the title of his *Tractatus* were

French jurists, namely Bugnyon, Baro and, further, Ludovici, and Papon. It is striking that neither Groenewegen nor the Roman-Dutch authors he quoted provide a single reference to the opinions of contemporary jurists from countries other than France, such as Spain or Germany. This is particularly interesting since jurists from other *ius commune* countries also dealt at some length with the question of judicial liability.¹⁹³

Groenewegen's quoting exclusively from French authorities of the sixteenth and early seventeenth century may be taken as merely another demonstration of the widespread belief of the so-called Dutch elegant school of law in the efficacy (*translatio studii*) of French jurisprudence.¹⁹⁴ However, to leave it at that would mean closing one's eyes to the fact that both the French and the Dutch approaches must be considered important indications of a refined theory of judicial liability which appears to have prevailed since the days of humanism. To find an acceptable explanation for the promoting of a change in judicial liability in Roman-Dutch law by an influential writer such as Groenewegen, the following, somewhat detailed, *excursus* into the acceptance of French ideas in this field appears to be necessary.

inspired by the Latin title of Bugnyon's *Traicté des Loix Abrogées* which was titled *Legum abrogatarum et iniusitatarum in omnibus curiis, terris, jurisdictionibus et dominiis Franciae*. This opinion is also shared by De Wet, *Ou Skrywers*, 135 fn36. On this technique see what Holthöfer remarks in *Coquille* at 138 with regard to Coquille's *Institutions au droit Francois* (1607) or Automne's *Conferance du Droict Francois* or Bugnyon's *Traicté des Loix Abrogées*, namely that works of this kind "...tragen einem damals neuen, zuerst in Frankreich, im 17. Jahr. auch sonst in Europa aufkommenden Bedürfnis Rechnung, das gesamte innerhalb eines Landes anwendbare Recht ohne Rücksicht auf seine Provenienz geschlossen darzustellen. Hierzu boten sich verschiedene Modelle an. Man konnte entweder, von der subsidiären Geltung des gemeinen Rechts ausgehend, dieses der Darstellung zugrunde legen und die partikularrechtlichen Abweichungen jeweils an den sachlich einschlägigen Stellen hinzufügen."

¹⁹³ See at chapter VII 3 5 2 2 (c) (II) (γ) fn516 *et seqq.* for references to writers of the German *usus modernus* and the Pandectists.

¹⁹⁴ Zimmermann, *RHR*, 52-53; Wesenberg and Wesener, *Privatrechtsgeschichte*, 71-72; Hahlo and Kahn, *Legal System*, 497-498, 509-511, 514-517; Van Zyl, *Geskiedenis*, 226-227 and 311-313.

4 1 3 2 Overview of the development of the superior judiciary in France and the civil liability of French judges

In France, the development of the superior judiciary is closely related to the emergence of the so-called *parlements* which came into existence from the first half of the thirteenth century.¹⁹⁵ Following the same pattern of development as in the Burgundian *curia ducis* referred to earlier¹⁹⁶, the *Parlement de Paris* emerged from the French kings' *curia regis*. University-trained jurists successfully drove the feudal nobility out of the ranks of the king's council when it sat as a court of appeal. By the reign of Philip the Fair (1285-1314), the *Parlement* had managed to claim the entire royal appellate jurisdiction. In the following centuries, other *parlements* were created in addition to that at Paris.¹⁹⁷

By the fifteenth century, the French judges had become largely independent of the king. The major reason for this remarkable development unparalleled in Europe at that time was that the judges of the *parlements* could not be dismissed after the purchase of public (judicial) offices became common practice in France.¹⁹⁸ The purchaser paid a sum of money to his predecessor according to the rank of the office.¹⁹⁹ Initially, the kings only tolerated this reluctantly. In due course, however, they tried to make a fortune by issuing conditional consent only when the appointee had paid a certain fee to the king.

Undoubtedly this custom had a strong impact on judicial independence.²⁰⁰ The kings lost all their influence with regard to selection, nomination and removal of recalcitrant judges. Due to the notorious emptiness of the public coffers resulting from expensive wars, such as the French engagement in Italy during the early sixteenth century, as well as conspicuous waste, the kings were forced to accept practically any nomination by the *parlements* in order to raise

¹⁹⁵ For the following see the detailed outline provided by Dawson, *Oracles*, 273-290. Further, see Mousnier, *Institutions de la France*, 253-258; Van Zyl, *Geschiedenis*, 217-218.

¹⁹⁶ See above at 1 text at fn 4-9 and chapter 2 1.

¹⁹⁷ Namely at Toulouse (1279), Bordeaux (1451), Grenoble (1453), Dijon (1476), Rouen (1499), Aix-en-Provence (1501), Rennes (1554), Pau (1620), Metz (1633), Douai (1668), Besancon (1676) and Nancy (during the eighteenth century). For details see Musnier, *Institutions de la France*, 254-256.

¹⁹⁸ Swart, *Sale of Offices*, 5-10.

¹⁹⁹ Mousnier, *Institutions de la France*, 38.

²⁰⁰ See Dawson, *Oracles*, 355-356.

money.²⁰¹ On the other hand, they could hardly dismiss a judge since the buyer of the judicial office had to be reimbursed, which for the same practical reasons was impossible.²⁰²

From the venality of office, it was only a small step to hereditary judicial office, the birth of the famous French *noblesse de robe*.²⁰³ From the earliest days, the *parlements* also retained the right to fill vacant seats on the bench by cooption. Further confirmation of the independent position of the French *parlements* derives from the fact that from 1493 royal edicts only became valid law when the edicts had been registered by the *parlements*, the so-called *enregistrement*. Frequently, the *parlements* simply denied registration and remonstrated (*remonstrances*). It was then up to the king to appear personally before the *parlement* and to enforce registration (*lit de justice*), in any event a most humiliating procedure.²⁰⁴

It is evident that the French kings were not willing to accept their ousting by the *parlements*. Already in the fourteenth century, the kings assigned a certain jurisdiction to their *Grand Conseil du Roi*.²⁰⁵ Furthermore, they sought relief by means of the notorious *lettres de cachet* (imprisonment of individual judges); by the establishment of 60 intermediate courts of appeal (*presidiaux*) below the *parlements*²⁰⁶; and by the creation of special *ad hoc* courts staffed by dependent judges. The kings' failure to retain some kind of control of the superior courts, however, is indicated by the degree to which judges were held accountable for mistakes.²⁰⁷ In this respect, a new solution to the problem of judicial accountability, the French so-called *prise à partie*, must be noted. An analysis of the etymological roots of the term gives a valuable hint of the origins of this practice. *Prise à partie* literally means to take a person to a *partie*, that is to a duel.

In the early Middle Ages, trial by battle was a common feature of the folk courts. In an earlier chapter, mention was made of the so-called *Schelte* at the Germanic folk courts and the

²⁰¹ Swart, *Sale of Offices*, 12.

²⁰² Dawson, *Oracles*, 353; Wesenberg and Wesener, *Privatrechtsgeschichte*, 68.

²⁰³ See Mousnier, *Institutions de la France*, 318-327 and Swart, *Sale of Office*, 13-14 for details.

²⁰⁴ For details see Dawson, *Oracles*, 362-365; Mousnier, *Institutions de la France*, 375-379; Meyer, *Frankreich*, 235-237.

²⁰⁵ Mousnier, *Institutions de la France*, 273-275 and 397-399.

²⁰⁶ *Ibid.* at 260-264.

²⁰⁷ This point is stressed by Giuliani and Picardi, *Responsabilità*, 50: "Nel XIV secolo il sovrano francese - come quello inglese - incoraggiava il controllo del giudice sulla propria attività normativa: in questo periodo va ricercata la preistoria di istituti fondamentali - come l'*enregistrement* - che sollevarono gravi conflitti istituzionali nell'età dell'assolutismo."

challenging of a judgement in cases of *Rechtsverweigerung* or denial of justice (the reference being to *faussement de jugement* and *déni de justice et audience* in France and Flanders).²⁰⁸ Initially, there were various instances of denial of justice eg. where the judge did not give a judgement; where the judge delayed his decision contrary to the local *costuymen*; where the judge gave his decision only on condition that a substantial sum of money was paid, or where he disregarded the opinion of the lawspeakers.²⁰⁹ In Flanders, from about the early fourteenth century onwards, the importance of the *Schelte* or *faussement de jugement* in cases of wrong judgements surpassed that of *déni de justice*. Originally where a party decided to challenge the judgement, the burden lay on the challenger to prove his complaint. The most impressive mode of leading evidence in those irrational days was trial by battle²¹⁰, a duel in court between the challenger and the judge. Here the judge was *pris au court à une partie*, in order, literally, to defend his judgement. However, at a later stage the remedy of *faussement de justice* was intended to grant to the parties an action against a judge or a court who “...wetens en willens een vals vonnis hadden geweest...”. In the fourteenth century, a battle was no longer required. On the contrary, it was now the local count and his representatives who decided on the success of the action.²¹¹

Similarly in France the actual duel in cases of *faussement de jugement* must have fallen into disuse. Nevertheless, the idea of calling in a judge before a court to defend himself for a deliberate wrong judgement must have been very attractive to the French kings in seeking to restore their authority against the mighty *parlements*. Consequently, in 1540 for the first time, the term *prise à partie* was mentioned in the *Ordonnance de la Normandie de Décembre* by King Francis I. In Art 1 we read: “Ne pourront les judges estre pris à partie, sinon qui l'on maintienne par relief qu'il y ait dol, fraude ou concussion ou erreur évidente en fait ou en droit...”.²¹² In 1573, Henry III and, in 1667, Louis XIV followed suit with largely similar

²⁰⁸ See also chapter III 5 and the authorities quoted there. For the course of developments from the fourteenth century onwards see Giuliani and Picardi, *Responsabilità*, 49-51; Buntinx, *Audientie*, 238-241. Note also Frewert, *Ehrenmänner*, 19-22.

²⁰⁹ Buntinx, *Audientie*, 239.

²¹⁰ In the Netherlands reference was also to the so-called *Kampgevecht*. See Van Spaan, *Verhandelingen*, 18.

²¹¹ Monballyu, *TR* 61 (1993), 238; Buntinx, *Audientie*, 241-244; Ganshof, *Faussement de Jugement*, 115-140.

²¹² Quoted from Giuliani and Picardi, *Responsabilità*, 56. See also in Automne, *Conferance du Droict Francois*, in l. extra territorium, 20.

ordinances. Furthermore, the *prise à partie* continued to include those ancient instances where a judge denied justice, i.e., not through a wrong decision but no decision at all.²¹³

Three aspects of the development of judicial liability in French law must be noted: Firstly, in the kings' *ordonnances* with regard to the *prise à partie*, there was no talk of the *iudex qui litem suam fecit*, and of traditional quasi-delictual liability. Thus, we can say that in French law of that age the kings put the liability of the judges on a new basis, which had nothing in common with the rules and principles of Roman law.²¹⁴ This is explicitly confirmed by French jurists of the seventeenth and eighteenth centuries who noted that the concept of the *iudex, qui litem suam fecit* was known in France, but that the doctrine was taught (and applied) outside of France: "...*haec questio potius est scholae quam fori.*"²¹⁵

This new basis of judicial liability is confirmed by the second aspect. On the basis of their own ordinances, the kings were soon forced to rule that judges could not be held liable by a party for any culpable mistake but only for *dolus* and *culpa lata* (*dol, fraude ou concussion ou erreur évidente*) and denial of justice. This was all the easier for the kings since the *prise à partie* lacked any of the traditional Roman roots that favoured a much wider scope of liability.

Thirdly, a new dimension must be ascribed to the kings' efforts to institute judicial civil liability. Although an action for civil liability still had to be instituted by a private party, the interests of the individual that suffered from the judicial wrong were not considered nearly as important by the kings as the interests of the monarch himself, namely to utilise this kind of civil liability as an (indirect) means of controlling the judges. Consequently the French approach brought into the limelight a new conflict: that of the kings against 'their' judges on the benches of the *parlements*. Thus, for this age, considerations of professional liability, such as played an important role in the Italian *ius commune*²¹⁶, were almost irrelevant.

²¹³ Pothier, *Traité de la Procédure Civile et Criminelle*, partie III, IV: "*Le dol, la fraude, ou la concussion du juge, donnent lieu à la prise à partie; il ya lieu à cette intimation dans tous les cas auxquels les ordonnances prononcent la peine de la prise à partie, tel qu'est le cas de déni de justice.*"

²¹⁴ Picardi and Giuliani, *Code Louis*, XLVII-XLVIII; Giuliani and Picardi, *Responsabilità*, 65-66.

²¹⁵ Louet, *Recueil de Plusieurs Arrests*, 270 and De la Roche Flavin, *Treize Livres des Parlemens*, vol.X c.34 as quoted by Dawson, *Oracles*, 289. See again Loyseau, *Du Droict des Offices*, 1.14.35 together with 34; Bugnyon, *Traicté des Loix Abrogées*, 9-10 and Automne, *Conferances du Droict Francais*, ad titulum XLIX de poena iudicis qui male iudicavit.R.

²¹⁶ Giuliani and Picardi, *Responsabilità*, 52.

Under an absolutist regime, the sovereign was clearly not interested in judicial privilege. The sovereign's judges were supposed to be organs of his will, devoid of any real autonomy. The powers of all branches of government were supposed to be concentrated in the monarch. That symbol of autocratic rule, Louis XIV, is said, as a young man, to have uttered his famous phrase "*L'État, c'est moi!*" to none other than the members of the *Parlement de Paris*.²¹⁷ Civil liability and criminal liability of judges were in the monarch's interests already in the days of the late Roman empire and served to overcome corruption, partiality, inefficiency and decadence.²¹⁸ In the absolutist state, the main purpose of such liability was to make judges vulnerable and thus docile towards the sovereign. The French kings pressed for judicial accountability as an additional means of enforcing discipline and, by diminishing judges' autonomy, an indirect mechanism of control and conditioning.²¹⁹ To this may be added the monarchs' growing fear of losing power to the increasingly professionalised bureaucracy, an aspect suggested by Max Weber.²²⁰ Weber convincingly argues that expert knowledge became the foundation of the power of the monarchs' servants. Hence, the sovereigns were at pains to find ways to use this expertise without at the same time forfeiting their own power. This strong disciplinary connotation of judicial liability might be inferred from Charles IX *Ordonnance de Paris de Janvier 1563* at Art 27 where it is stated that judges had to face a fine of 60 livres and removal from office for wrong judgements (*mal iugé*):

"Les hauts Iusticiers ressortissans nuement en nos Parlemens, seront condamnez suivant l'ancienne Ordonnance en 60.liv. parisais pour le mal iugé de leurs Juges. Lesquels aussi ils pourront revoquer & distribuer à volonté de leurs charges & Offices, sinon au cas leursdits Officiers eussent esté pourvus par recompense de services, au autres titres onereux."

And in an *Ordonnance* by Francis I of 1539 we read in Art 141-143:

"Les Iuges qui seront trouvez avoir fait fautes notables en l'expedition des procès criminels, seront condamnez en grosses amendes envers nous, pour la premiere fois, 6 pour la seconde suspendus de leurs Offices pour un an, & pour la troisieme privez de leur Offices, & declarez inhabiles de tenir Offices Royaux. Et neantmoins seront condamnez en tous les despens, dommages & interests des parties, qui seront taxez & moderez selon la qualité de la matiere."

On the other hand one must admit that these postulates not necessarily matched the reality. In other words, the scope of judicial liability, namely liability only for *dolus* and *culpa lata* is not

²¹⁷ Kelly, *Western Legal Theory*, 254.

²¹⁸ See above at chapter II 2 3 fnn176-179.

²¹⁹ Picardi and Giuliani have found the following (true) expression at *Code Louis*, XLV: "*La magistratura non poteva però, non avvertire, al di là dell'apparato sanzionatorio, un disegno di politica legislativa, che mirava ad introdurre meccanismi di controllo e di condizionamento del giudice.*"

²²⁰ *Wirtschaft und Gesellschaft*, 574.

evidence of the (practically) successful establishment by the kings of a mechanism of control of their judges. This shows that certain conditions in France, from the first half of the sixteenth century onwards, must have stimulated the movement towards limitation of liability.

It was natural that judicial vulnerability would disappear and judges would become stronger, that is more autonomous, when they managed to emancipate themselves from the monarch. This could occur only when the judges had achieved an institutionally autonomous status within the monarch's government, in other words, when they acquired a considerable degree of independence. It was in keeping with the truly impressive independence of the French judges of the *parlements* that they fiercely rejected the monarchs' efforts to retain control of the judiciary by any form of disciplinary, criminal or civil accountability. In fact, the *Ordonnance civile du mois d'Avril de 1667*, which was part of the so-called *Code Louis*, further restricted judicial liability to *dol, fraude ou concussion*. The scope of liability no longer had much in common with Roman law or the Italian *ius commune*.²²¹

4 1 3 3 *The revolution of 1581 as a breeding ground for the French law of judicial liability in the Netherlands*

To return to the situation in the Netherlands, there is little point in arguing that the Burgundian-Habsburgian judges of the Dutch equivalents of the French *parlements*, the *Parlement de Malines* and the provincial *raade*, held an equally independent position during most of the sixteenth century. As in France, there was a strong degree of professionalism. Nevertheless, as pointed out earlier, the Dutch judges held office only at the pleasure of the ruler.²²² In addition, at least under the Burgundian-Habsburgian rulers there existed practically no purchase of judicial office²²³, there was no talk about the councillors' right to fill their ranks by cooption, there was no obligation of *enregistrement*, and the Dutch territories never

²²¹ The foregoing quotes from Francis I and Charles IX are quoted in Automne, *Conferance du Droict Francois*, ad titulum XLIX de poena iudicis qui male iudicavit. For details of further development see Giuliani and Picardi, *Responsabilità*, 57-65; Picardi and Giuliani, *Code Louis*, XLV-XLVIII; Van Zeven, *Onrechtmatige Daad*, 210-211 as well as Schrage, *Legal History* 17 (1996), 109-111 who appears equally to have based his research on the works quoted above.

²²² See the text above at fn8.

²²³ Swart, *Sale of Office*, 70 refers to endemic corruptibility at the courts but he also makes the point that the Habsburgian rulers: "...realised the dangers involved in the selling of their authority to their subjects." For the (unlawful) development during the time of the Dutch Republic see Van Poelgeest, *Bijdragen* 103 (1988), 30-33; Huussen, *Bijdragen* 93 (1978), 257-259.

saw their ruler appear *in persona* before the courts in order to push through one of his enactments. In the tight grip of the rulers in which they found themselves, it is unlikely that the judges of the Burgundian-Habsburgian courts felt in a position to press successfully for any sort of privileged status, for instance by means of restricted criminal or civil liability.

Arguments in favour of this view can be found in an article by Professor De Schepper.²²⁴ According to De Schepper, it was common practice in the sixteenth century for cases of minor offences committed by public servants (*ambtsovertredingen*) and criminal offences (*ambtsmisdrijven*) to come before the *Groote Raad* at Mechelen, which had ordinary jurisdiction (*iustitia ordinaria*) in cases of partiality, carelessness, abuse of power, etc. In addition, there was the sovereign's secret council (*Geheime Raad*) to which was assigned extraordinary jurisdiction (*iustitia extraordinaria*). Evidently, councillors of the supreme courts were as much subject to investigation and control by the *procureur-generaal* and a suit before the *Groote Raad* as any other servant of the sovereign. For instance, De Schepper refers to the case of a councillor of the *Groote Raad* itself who, in 1515, was sued and sentenced to temporary suspension of office for contumelious behaviour.²²⁵ Certainly a trial of this kind was primarily of a criminal character. From material accessible in South Africa, it is difficult to trace further details as to civil actions against councillors of the supreme courts in the Netherlands prior to foundation of the Republic in 1581. However, that this was not an impossibility is hinted at by De Schepper when he says:

*"Terzaake vervaagde de grens van de rechtspraak over ambtsovertredingen niet allen met de criminele, maar ook net de civiele rechtspraak. De beide Hoven vertegenwoordigden in het laatste geval weer de vorst, die tevens als burgerlijk rechterde bestuursorganen en hun officieren controleerde."*²²⁶

It is my opinion, in view of the relatively unprivileged status of the judiciary under the Burgundian-Habsburgian rulers, that the reason for the sudden upheaval in Roman-Dutch law (namely that within a few decades liability lay merely for grossly inappropriate and unacceptable conduct, that is for *dolus*) was closely related to the fundamental weakening of the principle of single, indivisible sovereignty in consequence of the dethronement of Philip II in 1581. After the Dutch revolution, there was no monarch with a strong interest in a vulnerable judiciary and the upholding of the ideal of indivisible sovereignty. The argument

²²⁴ De Schepper, *Gerichtliche Kontrolle*, 68-71.

²²⁵ De Schepper, *Rechter en Administratie*, 380.

²²⁶ *Ibid.* at 382.

here is that the vacuum created by the revolution resulted in an elevation of the status of the judges. Suddenly the road was open for the formation of a more autonomous and consequently a more privileged judiciary. In fact, as pointed out earlier, from 1581 onwards the superior courts of the provinces emerged as institutions largely independent of the other arms of government. Consequently, this – in a sense – unexpected development was ideal ground for the undisturbed reception of the ideas of the French school of judicial liability by seventeenth century Dutch writers such as Groenewegen.

In this context, however, it is important not to confuse the quest of the sixteenth and seventeenth century French *parlements* for independence from the kings, or the Dutch jurists' efforts to qualify judicial liability in consequence of the weakening of the ideal of indivisible sovereignty, with those ideas of judicial independence and separation of powers that were introduced during the age of enlightenment by Montesquieu in his famous *L'Ésprit des Lois*.²²⁷ Only from about the second half of the eighteenth century was the time ripe for the idea of a truly emancipated and independent judiciary. And it was only from the beginning of the nineteenth century that the image of the modern judge began to take shape. An image which suggests the judge's independence as much from the sovereign as from the parties before him, as well as the protection of the judge's independence and impartiality through freedom from civil liability. Prior to the age of enlightenment, thus, the efforts of the judiciary (or the legal community, including the legal writers) to escape liability did not necessarily denote idealism or philosophical long-sightedness. Instead, these efforts were owing to more or less selfish motives as will become apparent from right below.

Apart from these developments, an additional argument in favour of qualified judicial liability can be drawn from the socio-political realities of Dutch local life in the seventeenth and eighteenth centuries. The idea that it was the members of the ruling local regent-patriciate who were particularly interested in judicial privilege is not implausible. Generally speaking, the leading local figures were not educated lawyers or administrative specialists. As pointed out earlier, they (or their kinship) were not professionals but men of 'quality' who were called

²²⁷ Simon, *Unabhängigkeit des Richters*, 2. Kelly, *Western Legal Theory*, 253-258, and at 282 referring to M S Anderson, he records the belief which was commonplace in the political thinking of the enlightenment that the: "...best form of government is one in which the individual is subject to known and clearly expressed laws; this ideal ruled out the arbitrary and uncontrolled 'oriental despotism' which every thinker of that age agrees in rejecting."

to honorary local office.²²⁸ Thus, much of the education argument of Groenewegen and others holds true.

Consequently, it is almost certain that the powerful regents were at no stage interested in a professional local judiciary in the hands of state officials subordinate to a strong ruler. Hence, when the republic emerged and federalism was the rule of the day, the local regents very much favoured any development that kept judicial positions for the local lay honoraries, which to a large extent meant themselves or their families. Since it was the regent-patriciate which in practice held power in both the cities and the provincial estates, which in turn governed the country²²⁹, it is argued here that with regard to judicial liability the interests of the national post-revolutionary rulers coincided with the interests of the local rulers and, correspondingly, with those of the local judges, as much as with a large percentage of the judges of the superior courts.

Professor Van Deursen in his well-known book *Het kopergeld van de gouden eeuw* provides a number of examples from which it is obvious that in everyday legal practice members of the ruling regent class frequently escaped liability for corruption, embezzlement and other irregularities. He makes the point that legal proceedings against a regent were generally considered to be hopeless and that persons of 'quality' fell outside the ordinary rules.²³⁰ The comments of Willem Schorer, then President of the Court of Flanders, also point in this direction. He once said that he would "...prefer to paint justice as blind of one eye rather than of both..."²³¹

Seen from this angle, it is not surprising that in post-revolutionary Netherlands no one pressed for the retention of judicial liability as an instrument of control. It goes without saying that this argument could hardly be proclaimed openly either by the regents or by jurists such as Groenewegen, who, it must be remembered, was for most of his life secretary and legal

²²⁸ See the text above at 1 fnn22-25 and 2 1 fnn 39-42.

²²⁹ See for instance Van Poelgeest, *Bijdragen* 103 (1988), 23-24. Van Poelgeest makes the point that c. one fifth of the judges of the *Hoge Raad* belonged to the regent-patriciate class by birth (profession of the father). If we are to take into account the profession of the grandfather this number rose to two fifths and to three fifths if we take into account the class to which the respective fathers-in-law belonged. Hussein in his detailed account of the situation at the *Hof van Holland* in *Bijdragen* 93 (1978), 257 makes a similar point where he refers to the sale of (judicial) offices in Friesland and states that obviously there existed a dramatic trend towards *oligarchisering* and a *nog grotere verenging van het recruteringsveld*.

²³⁰ Van Deursen, *Het Kopergeld*, 165-167. See also Lademacher, *Niederlande*, 207-208.

advisor of his hometown of Delft, one of the most influential cities in the Province of Holland. However, it is not improbable that, although not written, such was thought.

4 1 3 4 *Groenewegen's adaptation of the French doctrine of restricted judicial liability to Roman-Dutch law*

If one is to consider the above-mentioned arguments as the breeding ground for the reception in Roman-Dutch law of the ideas of the French doctrine, practical difficulties must not be overlooked. Roman-Dutch law never formally accepted the *prise à partie*, making it impossible for Groenewegen to base his own approach with regard to the situation in the Netherlands on this special type of legal instrument introduced in France. Consequently, he was obliged to find an acceptable solution on the basis of those remedies provided by Roman-Dutch law .

It is this need to find an acceptable basis for restricted judicial liability that explains Groenewegen's approach of determining the relevant action under which a party could sue a judge. To restrict judges' liability, it goes without saying that for Groenewegen the *actio in factum* for *imprudentia* was out of the question. The *actio legis Aquiliae* also hardly suited his objectives since the Aquilian action lay for either *dolus* or *culpa*. An unintended result of its use would have been to restrict the application of the *actio legis Aquiliae* with regard to judicial liability merely to instances of *dolo* conduct. Inevitably, there was only one possibility left for Groenewegen: the application of the *actio de dolo*. It was the *actio de dolo* that provided for full restitution for pure economic loss in the event of *dolus malus*, an aspect which strikingly resembled the French requirement of *dol, fraude ou concussion*.

It may be remembered that the dogmatical foundation of Groenewegen's restrictive approach derives from the passage in *D* 50.17.47, where the liability of fraudulent advisors and legal experts under the *actio de dolo* is discussed. However Groenewegen's approach is subject to the following criticism. While applying *D* 50.17.47, Groenewegen makes an extensive interpretation which is not only an extension but a softening of the rule. Neither in Roman law nor in the Italian *ius commune* was *D* 50.17.47 ever applied directly to instances of judicial wrongdoing. Moreover, it appears from Voet's comments on the subject, which will be

²³¹ Grotius, *Introduction to Dutch Jurisprudence*, 3.37.9.

discussed in due course, that in Roman-Dutch law a judge's liability was generally not based on the liability of fraudulent advisors. In other words: giving expert advice and rendering a judgement was not the same even in those cases where judges, particularly lay judges of the lower courts, relied on the *advysen* of trained jurists, such as professors or advocates, in complicated matters of law and fact.

Finally, another interesting aspect of Groenewegen's approach to judicial liability should be noted, namely liability in cases of denial of justice, the category of liability subsumed in French law under the term *déni de justice*. As a matter of fact, Groenewegen does not discuss liability for denial of justice under the same heading as liability for judicial mistakes. Furthermore, in comparison with the above instances, he does not include any reference to the French *usus*. Only in more remote passages of his commentary on the *Codex* and the *Novellae* does Groenewegen provide us with details: Persistent with his general view denial of justice also resulted in an *actio de dolo*.²³²

Undoubtedly, Groenewegen's approach generally of reconciling foreign (French) ideas with the situation in the Netherlands is a vivid example of the technique of the Dutch jurists of the seventeenth century. Groenewegen's arguments had an enormous impact on successive generations of Dutch jurists, among others Simon van Leeuwen.

4 1 4 Simon van Leeuwen

Simon van Leeuwen was born in Leiden in 1626 and educated at Leiden University. After years of practice as an advocate at the The Hague and Leiden, he became, shortly before his death in 1682, assistant registrar of the *Hoge Raad*.²³³ One of his chief claims to fame is that he was the first person to introduce the term '*Rooms-Hollands Regt*' in legal textbooks. He used it as the title for one of his two major works, *Het Rooms-Hollands Regt*, a textbook on

²³² See Groenewegen, *Tractatus*, C.3.1.13.2 and 4, C.4.3.18 as well as Nov.86. See further Wassenaar, *Praxis Iudiciaria*, 1.233-237; *Instructien van den Hove van Hollandt, Zeelandt ende Vriesland* Art. 213 and 214; Voet, *Commentarius*, 5.1.20.

²³³ For more bibliographical details see Wessels, *History*, 306; *Van Leeuwen's Roman-Dutch Law*, Introductory Note; Hewett, *Censura forensis Part I Book V*, Introductory Note; Zimmermann, *RHR*, 44-45; De Wet, *Ou Skrywers*, 139-140;

civil and procedural law which was published in 1664. His other major work is *Censura Forensis*, a systematic overview of contemporary civil law with all its various Roman, Dutch and foreign legal sources. Van Leeuwen was a very productive and well received author. His literary works, however, have been criticised.²³⁴

Like most other Dutch authors, Van Leeuwen distinguished between wrongful acts due to *dolus malus* and those due to *imprudentia*. Generally speaking, his position was that a judge who gave a wrong judgement from lack of skill did not make the case his own.²³⁵ However, in the chapter on quasi-delicts in his *Censura Forensis* – where one would expect to find an in-depth analysis of judicial liability – Van Leeuwen provides hardly any arguments to back his views. He merely refers his readers to the first of the two arguments advanced by Groenewegen at the same point, and to the authorities cited by him.²³⁶ The chapter on quasi-delicts in his *Rooms-Hollands Regt* provides even less information. Nevertheless, Van Leeuwen's approach is generally consistent. Since, in his opinion, a judge could be held liable only for *dolus*, not *imprudentia*, and, in his view, the quasi-delicts covered only negligent actions, judges' liability no longer fitted into the scheme of quasi-delicts.²³⁷ Van Leeuwen thus had to find another place to discuss the liability of the *iudex*.

This place, in both his major works, seems to be the category of delicts. In his *Censura Forensis*, Van Leeuwen discussed the liability of the judge even within the chapter on the crime of extortion. He discusses various aspects of this liability, namely extortion and corruption, as well as – important to our subject – wrong decisions due to *dolus malus* or *imprudentia*.²³⁸ Van Leeuwen begins his treatment of the topic with a discussion of the liability of a judge who accepts money to perform or not perform his duties in a certain way. In section five of this chapter of *Censura Forensis*, Van Leeuwen refers to the case of the

Roberts, *Bibliography*, 183; Van Heijnsbergen, *Geschiedenis*, 102; Smits, *Rechtsgeschiedenis*, 126; Walter, *Actio Iniuriarum*, 68; De Vos, *Regsgeschiedenis*, 182-184; Van Zyl, *Geskiedenis*, 357-359.

²³⁴ Note De Wet, *Ou Skrywers*, who can be quoted at 140: "Hy was 'n veelskrywer en 'n oorskrywer." See also Zimmermann, *RHR*, 45 with further references.

²³⁵ See, *Censura Forensis*, 1.5.7.5; 1.5.30.1; 2.1.8.9; 2.1.31.17 at the end and 2.2.13.21. See further *Rooms-Hollands Regt*, 4.33.10 and 4.39.3 at the end.

²³⁶ *Censura Forensis*, 1.5.30.1.

²³⁷ This is exceptionally clear from his comments in *Censura Forensis Part I Book V* at 1.5.7.5: "...nor is he understood to have made the case his own, contrary to Inst. 4.5.pr."

²³⁸ *Censura Forensis*, 1.5.7.

judge who gives a wrong decision due to lack of knowledge. Van Leeuwen, like the authors analysed so far, denies any liability of the judge in this case. His central argument appears to be the 'appeal argument':

"...he who thinks he has been unfairly put upon by the decision of a judge can have the judgement reversed by appeal to a superior judge."²³⁹

This view is strengthened by what he says in his *Rooms-Hollands Regt* about the right to appeal:

"...for it is a privilege extended to the injured...party against the wrong and the stupidity of the judge. And as he, who uses his own right, injures no one so the party does not injure the judge by appealing..."²⁴⁰

And in the procedural part of *Censura Forensis*, Van Leeuwen repeated his opinion that the remedy of appeal is an effective means for the injured party to obtain relief:

"*Sed moribus iudex per imperitiam male judicans litem suam non fecit, neque parti laesae tenetur, qui appellationis, aut revisionis remedio uti potest.*"²⁴¹

It appears from these arguments that Van Leeuwen, more than any other writer so far assessed, recognised the importance of the right of appeal to the scope of judicial liability. What had been indicated already by Vinnius in his comments on judicial liability is elaborated on by Van Leeuwen. It is self-evident that the right of appeal (where it applies) warrants equity and objective justice at the level of a superior court; and a factual adjustment by means of delictual liability therefore no longer appears to be necessary. From the point of view of legal development, one can say that the arguments cautiously advocated by Bartolus in the Middle Ages now had, centuries later, a large impact on the scope of judicial liability envisaged in Roman-Dutch law.²⁴²

Meanwhile, neither Van Leeuwen nor any of the other jurists included a direct reference to Bartolus's theory. Furthermore, it is interesting that no reference is made to the other arguments advanced by Bartolus in this regard, for instance the consequences of a party's omitting to initiate appeal procedures. The sole idea on which Roman-Dutch lawyers based their argument was the possibility of repeal or correction of the judgement *a quo* by the appeal court. Van Leeuwen, as a practitioner, believed that the possibility of appeal affected the

²³⁹ *Censura Forensis Part I Book V* at 1.5.7.5 at the end.

²⁴⁰ *Van Leeuwen's Roman-Dutch Law*, 5.25.12.

²⁴¹ *Censura Forensis*, 2.1.31.17.

scope of judicial liability. He thought that because of the possibility of appeal the judge should not be held liable for all conceivable wrongs.²⁴³

Interestingly, however, he and all his fellow writers, dared not to mention that in criminal proceedings appeal procedures practically did not apply. Criminal cases (except for trifling cases) were heard before the various *hofs* and thus appeal procedures were not provided for, as appears from the *Groot Placaet-Boek*.²⁴⁴ Thus, the appeal argument, attractive as it is, lacked one important component in Roman-Dutch law to make it a truly effective remedy that could be raised in place of extensive judicial liability: The wide range of possible judicial mistakes in criminal matters simply was not covered by the appeal argument. From a modern point of view, obviously a scandalous state of affairs.

Finally, it is not entirely clear whether Van Leeuwen in his *Rooms-Hollands Regt* also wished to apply Groenewegen's argument that judges lacked ability and expertise. He refers to this in 4.33.11, the section which deals with the liability of the advocate. The original version of this section mentioned *regts-voorspraak* (advocates, lawyers) and not *regters*. However, it might be argued that, owing to the strength this argument had gained in the meantime in Roman-Dutch law, Van Leeuwen also had in mind judges. That Van Leeuwen was well aware of the 'ability argument' is emphasised by another relevant passage in the second part of his *Censura Forensis*, which focuses on procedural questions. In a chapter which deals with the liability of court officials, Van Leeuwen refers to the science of law as follows:

*"Sed quum munus illud in tam difficili Juris & Praxeos scientia, & tanta circum procedendi stylum atque ordinem varietate tantaque causarum moram non serentium multitudine versetur, ut nec plenum aliquando detur deliberandi tempus..."*²⁴⁵

²⁴² See above at chapter IV 3 5.

²⁴³ Brief general remarks on the questions relating to appeal procedures can be found at Dolezalek, *Zivilprozessrecht*, 89-92. With regard to the roots of the Dutch appeal procedures in Flanders see the article by Monballyu, *TR* 61 (1993), 237-274. For more details see Merula, *Manier van Procederen*, 2.8.1; 4.3.2.7; 4.4.1.4; as to *reformatie* see 2.9.1. Further Van Leeuwen, *Rooms-Hollands Regt*, 5.25; Van der Linden, *Judicieele Practijcq*, 1.24. For an additional aspect of the relationship between appeal procedures and judicial liability see below at 4 2 2.

²⁴⁴ At vol.II, 1061 *et seq.* Huber, *Jurisprudence of My Time*, 5.45.9 states: "We are speaking here of litigation of a civil, not of a criminal nature, since the Court alone may decide in the latter, and from it no appeal of any kind lies in criminal matters. See also Huussen, *Bijdragen* 93 (1977), 246.

²⁴⁵ *Censura Forensis*, 2.1.8.9.

Summing up, it may be said that Van Leeuwen still recognised the existence of the group of quasi-delicts. However, he both extended and narrowed its scope. He included the *actio de pauperie*, but excluded the liability of the judge.²⁴⁶ Van Leeuwen restricted judicial liability to cases of *dolo* misjudgements. Clearly, this concept no longer fitted into his scheme of quasi-delicts, which are restricted to cases of *culpa*. Consequently, he classified the liability of the judge as a true delict; and, moreover, discussed it within his chapter on extortion, which is a *crimen laese majestatis*. Thus, Van Leeuwen recognised the ‘public’ interest in the accountability of the judiciary, a tendency noted earlier in discussion of the French kings. Van Leeuwen agreed with Groenewegen that on the basis of *D* 50.17.47 the *actio de dolo* and not the *actio legis Aquiliae* was the appropriate *actio* for an action against a judge.²⁴⁷

4 1 5 Johannes Voet

Johannes Voet (1647-1713) belonged to a well known Utrecht family of scholars. His father Paul was also a professor of law, his grandfather a professor of theology.²⁴⁸ Voet studied law at Utrecht and graduated – it is not entirely certain when – in France around 1668. He became a professor first at Herborn (Nassau), later at Utrecht and in 1680 at Leiden. Voet is generally considered to be not the most creative or innovative, but definitely one of the most influential of the writers on Roman-Dutch law.²⁴⁹ The work which laid the foundation of his enduring fame is his *Commentarius ad pandectas* (1698-1704). Each title of this work, which follows the arrangement of the *Digest*, deals first with Roman law and then with the *ius hodiernum*. The references that Voet includes in his commentary on Roman law as well as on authorities on the *ius commune* are impressive for their learning. Some humanist influences are traceable; he gives many examples of the forensic practice of his age; and he includes concepts of natural law. He may thus be considered a typical exponent of the Low Countries’ *usus modernus*. Voet’s contribution to legal science was not, however, restricted to the Low

²⁴⁶ Hochstein, *Obligationes Quasi ex Delicto*, 89 *et seq.*

²⁴⁷ *Censura Forensis*, 2.1.31.17.

²⁴⁸ The biographical literature on Voet is vast. For a comprehensive overview see Zimmermann, *RHR*, 39 fn142, see also Ahsmann, *Voet*, 641; De Wet, *THR-HR* 11 (1948), 50-57; Van Heijnsbergen, *Geschiedenis*, 62; further Smits, *Rechtsgeschiedenis*, 124, Van Zyl, *Geschiedenis*, 362-365; De Vos, *Regsgeschiedenis*, 184-189.

²⁴⁹ But see also the comment by Kotzé, *SALJ* 27 (1910), 196. Kotzé describes Voet as the ‘prince of compilers’. This is not necessarily derogatory. For a discussion see Zimmermann, *RHR*, 40-41.

Countries. He was very influential in other European countries, and remains authoritative in South Africa today.²⁵⁰

Voet discussed the liability of the judge in his commentary in 5.1.58. In keeping with the historical development, he included both the criminal and the civil aspects of judicial liability. In a decidedly clear and intelligible manner, Voet provides what might be called the best summary of the Roman law of judicial liability written by a Roman-Dutch author. Four paragraphs suffice to inform one about the most significant peculiarities of this liability.

With regard to the law of his time, Voet, like most of his fellow writers, excluded judicial liability for mere *imprudencia*.²⁵¹ This notwithstanding, Voet was the one Roman-Dutch jurist to indicate the significant practical consequences of the modified Dutch understanding of the scope of judicial liability, saying bluntly that *dolus* was practically impossible to prove:

“In our customs...it is rather rare for the judge to make the suit his own by ill judging. That is because it is a trite rule that he is not made liable by mere lack of knowledge or unwisdom, but by fraud only, which is commonly difficult of proof.”²⁵²

That Voet's opinion mirrored exactly the reality, particularly at the superior courts is apparent from Van Poelgeest's discussion of the decision-making process that applied at the *Hoge Raad*. Strict secrecy was imposed on the deliberations of the court. The judges faced impeachment and removal from office if they divulged internal information to third

²⁵⁰ On the influence of Voet see Feenstra and Waal, *Seventeenth Century Leiden Law Professors*, 81 *et seqq.*

²⁵¹ Schrage, *Legal History* 17 (1996), 107 indicates that Voet's opinion is to some extent different from Groenewegen's view. Schrage bases this interpretation on Voet's statement in his *Commentary* that the *actio de dolo* is not the only remedy available to an injured party in Roman-Dutch law. A judge can also be held liable on the basis of a quasi-delict although - contends Schrage - *imperitia vel imprudentia* itself is insufficient for liability. However, it seems to me, with due respect, that Schrage is wrong. Although Voet seems to refer to quasi-delictual liability when saying that it is rare for a judge who gave a wrong judgement to make the case his own, in my opinion Voet is applying 'wrong judging' more to the case of the judge who judges with *dolus*. Therefore his reference to *litem suam facit* seems to be, rather, his general paraphrasing of judicial liability. This is evident from the following sentence where Voet gives as the reason for the rareness of this liability the fact that liability was not for *imperitia aut imprudentia* but for *dolus*, which was very difficult to prove. This is reinforced by the wording of the corresponding section in Voet's *Beginnelsen des Rechts*, where at 4.5.4 and 5 he refers to "...het geding het zyne maeken..." in the case of *onkunde* or *onvoorzichtigheit* as well as in the case of *quaeder trouwe*, that is *dolus*. Hartog's view with respect to Voet's position is also somewhat inaccurate. In his *Onrechtmatige Overheidsdaden*, 22 he states that "...Voet en Van der Keessel ontkennen beiden de receptie van de regel over de gebondenheid van de iudex qui litem suam fecerit buiten kwade trouw of grof verzuim." However, there is no indication in any of Voet's works including the *Commentary* that he favoured liability for *culpa lata* and *dolus*.

²⁵² *Commentary*, 5.1.58.

persons.²⁵³ Hence Voet's comments rightly point to the essential problem of judicial liability, i.e., the difficulty of proving that the judge (or in the case of a *collegium* the judges) *dolo malo* had broken the law.

To further substantiate his view, Voet relied on what was also Groenewegen's main argument: it was unjust to hold judges – particularly lower court judges, who were unskilled in the science of law and had to hear a multitude of cases at very short notice – liable merely for lack of knowledge. It is questionable whether he also followed Groenewegen's reasoning that this principle derived mainly from the application of *D* 50.17.47. From Voet's commentary on the subject, it appears that Groenewegen's approach showed a somewhat superficial application of the principles governing the liability of advisors.

In several passages in his commentary, Voet provides us with details on the common practice at the lower (lay) courts in the Netherlands of calling on advocates and law professors for professional advice (*advysen*). The details are evident from Voet's assessment of a good judge: "A judge is an honest gentleman and fair, having himself or in his assessors skill in law."²⁵⁴ Undoubtedly, it was "...proper for him [the judge, to] take counsel from and to follow law, equity and sacred conviction together."²⁵⁵ There are a number of publications of the time in which this practice of calling for advice is reflected, to name only a few: there are the *Utrechtsche Consultatien*, Joost Schomaker's *Selecta Consilia et Responsa Iuris*; the *Nieuw Nederlands Advys-Boek* or the *Hollandsche Consultatien*.

From Voet's comments we can draw some fairly detailed conclusions as to the scope of judicial liability where the judge requested professional advice. Two cases must be distinguished: that of the judge who asked for advice and followed it; and that of the judge

²⁵³ Van Poelgeest, *Bijdragen* 103 (1988), 40. De Smidt, *Hoge Raad*, 207 observes: "The reasons for the decisions were not given: the judges' opinion is not apparent from the sentence. In the sentence, writers or other sources are never mentioned in support of an opinion." This observation, in a sense, once again confirms the correctness of the idea behind the so-called 'narrow view' on judicial liability introduced in Roman law above at chapter II 2 2 2.

²⁵⁴ *Ibid.* at 5.1.39.

²⁵⁵ *Ibid.* at 5.1.51. See also in this regard Huber, who states in his *Jurisprudence of my Time* at 4.15.18: "It is, however, a fact that certain judges are appointed without skill in the law [Huber refers to inferior judges] ... for which reason they are accustomed in deciding disputed cases, and according to the ordinance obliged to employ the advice of jurists. They therefore usually call in the leading advocates in the Court, or even take them into their continuous service, when they are called stipendiary counsellors (*pensionarissen*)."

who asked for but did not follow the advice, which in effect was treated as if the judge had never requested advice. Voet argues convincingly that only in the former case was the advisor or the legal expert (not the judge) liable, if actuated by *dolus malus*:

“The unwisdom of an assessor however, by which justice had been pronounced otherwise than it should have been, ought not to prejudice the magistrate but only the assessor.”²⁵⁶

In the case of the judge who requested but did not follow advice, it was the judge who was to be held liable when he had misjudged with *dolus*.²⁵⁷ Consequently, at no stage was the judge himself held liable under *D* 50.17.47. Voet is much clearer than Groenewegen or Van Leeuwen in showing that this rule could not apply directly to a judge.

As regards Voet's other works: His *Elementa Iuris* is merely a short commentary on Justinian's *Institutes*.²⁵⁸ However, in 4.5.6 of his *Beginnelsen des Rechts*, after discussing Vinnius's comments on the difference between the liability of the judge and that of the medical doctor, Voet introduces the familiar ‘appeal argument’ to substantiate his view that judicial liability ought to be confined to misjudgements involving *dolus malus*.²⁵⁹ This is in accordance with the opinion he expressed in his *Commentarius*. We can only guess whether Voet in the final analysis considered Groenewegen's ‘knowledge argument’ the more convincing, since he did not include the ‘appeal argument’ in his *Commentarius*. At least it is clear that Voet was well aware of both. In his *Compendium Iuris*, Voet again made clear his view (but without giving any reasons) that Roman-Dutch law did not recognise a judge's liability for misjudging merely from lack of knowledge.²⁶⁰ At 5.1.21 he states: “*Quod si iudex per imperitiam male judicaverit, non facit hodie litem suam; secus si dolo...*”.

²⁵⁶ *Commentary* at 5.1.58.

²⁵⁷ This also appears to have been the position in Germany at the time. See Geipel, *Konsiliarpraxis*, 28.

²⁵⁸ See also Wessels, *History*, 329. Roberts correctly remarked that Wessels was mistaken in suggesting that the *Beginnelsen des Rechts* was a translation of *Elementa Iuris*. See Roberts, *Bibliography*, 321. In fact, the latter does not cover any contemporary Roman-Dutch law.

²⁵⁹ *Beginnelsen des Rechts*, 4.5.6: “...noch een rechter wordt uit zyn vonnisse, zonder quaet bedrog alleen door onkonde uitgesproken, niet gehouden: maer de onrechtmatigheit van't vonnisse moet door het hulpmiddel van hooger beroep, worden tegengegangen.”

²⁶⁰ The *Compendium* was a well known student's textbook, used throughout Europe. Its influence on South Africa has been minor since it was overshadowed by Voet's *Commentary*. For more details see Roberts, *Bibliography*, 320; Wessels, *History*, 330 and Van Zyl, *Geskiedenis*, 364.

Since Grotius's opinion as to the liability of the judges was markedly different from that of many of his fellow authors, it is regrettable that we have no immediate comment on Grotius's view in Voet's *Observationes*.²⁶¹

Voet, beyond doubt, rejected a wide scope of judicial liability in Roman-Dutch law. Like Christianaeus, Vinnius, Groenewegen, and Van Leeuwen, he held that judges were liable only for *dolus*. Voet also advocated a division and, consequently, a weakening of the group of quasi-delicts, although in all his works except the Commentary on the Pandects, he discussed judicial liability under this rubric. What is not quite clear, however, is the relevant action for judicial liability. From his comments with respect to the application of the rule in *D* 50.17.47, it may be assumed that, in a suit against a judge for loss caused by a wrong judgement, the appropriate action was the *actio legis Aquiliae*, and not the *actio de dolo*. However, with regard to cases of denial of justice, the other category of judicial liability which Voet touches upon very briefly at 5.1.20, he approves liability under the *actio de dolo*.²⁶²

4 2 The contrary opinion: liability for *dolus* and *culpa lata*

Three eminent Roman-Dutch writers, Ulrich Huber, Dionysius Godefridus van der Keessel and Hugo Grotius appear not to have favoured the view that judicial liability lay for *dolus* alone.

4 2 1 Ulrich Huber

Ulrich Huber (1636-1694) is considered one of the foremost Dutch jurists between the time of Grotius and that of Van Bynkershoek.²⁶³ He was educated at the universities of Utrecht, Marburg, Heidelberg and Strasbourg.²⁶⁴ In 1657, he was called to his first chair at the

²⁶¹ Voet is not commenting on Grotius's view in this regard.

²⁶² Which is in accordance *inter alia* with Groenewegen and Wassenaar point of view. For details see above at fn232.

²⁶³ Zimmermann, *RHR*, 36-39.

²⁶⁴ For more bibliographic details see Zimmermann, *RHR*, 36-39; Walter, *Actio Iniuriarum*, 69; Feenstra, *Ulrik Huber*, 300; De Wet, *Ou Skrywers*, 144-146; Veen, *Zestig Juristen*, 120-129; Dekkers, *Bibliotheca*, 85; Roberts, *Bibliography*, 160; Wessels, *History*, 316; Van Heijnsbergen, *Geschiedenis*, 57; Smits, *Rechtsgeschiedenis*, 123; Van Zyl, *Geskiedenis*, 360-361; De Vos, *Regsgeschiedenis*, 195-197.

University of Franeker in the province of Friesland. After a brilliant career at this university, he became a judge of the *Hof van Friesland* at Leeuwarden in 1679. However, he returned three years later to Franeker as a private scholar. Huber's vast number of publications established him as an authority in such fields as private international law²⁶⁵, the law of the state²⁶⁶, and Roman-Dutch law.²⁶⁷ The fact that Huber was Frisian and that his *Heedendaegse Rechtsgeleertheyt* contains mostly Frisian law has called into question his status as an authority on the Roman-Dutch law applicable in Holland.²⁶⁸ In light of Huber's learning, his analytical abilities and his considerable influence on other non-Frisian writers, this judgement, appears to be unfounded.²⁶⁹

Huber discusses the liability of the judge with different degrees of comprehensiveness in a number of his works. His first major work, *Praelectiones Juris Civilis* consists of two parts: commentaries on the *Digest* and the *Institutes*, respectively. The first part of the commentary on the *Institutes* was published in 1678, the remaining parts in 1689 and 1690. In his *Praelectiones*, Huber focused on Roman law but indicated the modifications Roman law had undergone in contemporary law.²⁷⁰ In the first part of the *Praelectiones*, at 4.5.2, we are exposed to a debate on the subject of judicial liability between Huber and the well-known German scholar Christian Thomasius (1655-1728).²⁷¹ Huber presents his *positiones*, which Thomasius answers with a *scholium*. Huber responds to the latter with his *responsio* and Thomasius defends his views with a final *additio*. Huber's remarks in his *positiones* include the view that judicial liability could arise from misjudgement, based either on *dolus* or on *imperitia*.

Apart from noting that Thomasius would also render the misjudging judge liable for either *dolus* or *culpa*, Thomasius's responses may be ignored here. However, he would apply to both *dolus* and *culpa* the *actio legis Aquiliae*, which means that he considered obsolete the *actio in*

²⁶⁵ *De Conflictu Legum*. That is chapter 2.1.3 of his *Praelectiones Juris Civilis*.

²⁶⁶ *De Iure Civitatis*.

²⁶⁷ *Heedendaegse Rechtsgeleertheyt* and *Praelectiones Juris Civilis*.

²⁶⁸ Acceptance of Roman law in Friesland went beyond that in other Dutch Provinces, i.e., Holland. Thus Roman law was generally less modified and remained more pure in Friesland. Huber's *Heedendaegse Rechtsgeleertheyt* contained a 'great deal of pure Roman law', see Wessels, *History*, 318.

²⁶⁹ See also De Wet, *Ou Skywers*, 146.

²⁷⁰ Wessels, *History*, 317; Zimmermann, *RHR*, 38.

²⁷¹ With regard to Thomasius see Luig, *Thomasius*, 613.

factum for judicial liability (and, presumably, placement among quasi-delicts). Unlike Huber, he did not render the *culpa* misjudging judge *infamis*. All this provoked a fierce rejection from Huber:

“Actionem utilem legis Aquiliae ad suitatem litis producere nimis enorme videtur, ut modo demonstratum est. Diversitas condemnationis pecuniariae, quando culpa vel dolo male iudicatum est, evidenter collocata est in d.l.15.§1 de iudic. & hoc pr. Nec est quod a communi sententia heic recedere jubeat.”

From the *Praelectiones* it seems, quite remarkably, that Huber favoured comprehensive liability for misjudgement. This would mean, at least in Frisian law of the seventeenth century, that judges would be held liable on the same scale as in Roman law and in high medieval Italian law. The question that now arises is whether this remarkable view of Huber's is confirmed in his other works.

In his *Heedendaegse Rechtsgeleertheyt*, which first appeared in 1686, Huber discusses the liability of the judge under the heading *Van oneygentlijke Misdaeden*.²⁷² This work, a commentary on Frisian law but also on laws elsewhere in force, dwells less extensively on Roman law than does the *Praelectiones*. Huber refers at 2.3.3.5 to the judge that *qualijk oordeelt, buiten bedroch*. As this is exactly the case of the *iudex, qui litem suam fecit*, we are familiar with the legal consequences in Roman law. In addition, Huber states at 2.3.3.6 that a judge acting deliberately commits a true delict as opposed to a quasi-delict. By and large, Huber here confirms the view he had put forward eight years earlier in his *Praelectiones*.

Huber is first and foremost a Frisian author and, owing to a peculiar process of assimilation, Frisian law was much closer to Roman law than the law of the other provinces of the Low Countries.²⁷³ In analysing Huber's work, one is thus faced with the problem of distinguishing between his comments on Roman law and on contemporary Frisian or Roman-Dutch law. The question here is whether his comments, both in his *Praelectiones* and the *Heedendaegse Rechtsgeleertheyt*, merely describe the state of Roman law or whether they also represent his view of contemporary Frisian law. The *Praelectiones* generally tend to concentrate a great deal on Roman law. Furthermore, Huber does not refer explicitly at any stage of the *positiones*

²⁷² The chapter on *Oneygentlijke Misdaeden* appeared in the first edition in the third book of the second part. However, in the fifth edition which was edited by Huber's son Zacharias, and which was used by Gane, it appeared in the sixth book. See the remarks above at fn67.

²⁷³ As to the complex process of reception of Roman Law in Friesland see De Vos, *Regsgeschiedenis*, 152-153; Van Zyl, *Geschiedenis*, 304-305; Wessels, *History*, 318; Gerbenzon, *TR* 27 (1959), 133-157.

to the *usus hodiernus* or to any opinion of contemporary writers, who were clearly against a wide scope of liability. Further, he rejected Thomasius's fairly modern contention that the judge was not to be rendered *infamis*. Thus, one tends to believe that Huber's remarks state the position of Roman rather than contemporary Frisian law.

Uncertainty is compounded by Huber's *Heedendaegse Rechtsgeleertheyt*. At the very beginning of the relevant passages in this work, Huber refers to the fourfold arrangement of quasi-delicts according to Justinian, the *Keyserlijke Rechten*.²⁷⁴ He states the law of judicial liability in accordance with these Roman sources. However, three factors point away from the interpretation of the passages 2.3.3.5 and 6 of the *Heedendaegse Rechtsgeleertheyt* as a mere description of Roman law.²⁷⁵ Firstly, the title of the work itself is a strong indication that Huber's overall intention was to reflect the state of Frisian and not Roman law. Owing to the far-ranging acceptance of Roman law in Friesland, opinions frequently overlapped. This seems to be the case in the passages under consideration. Secondly, Huber, in other passages within the same chapter, points out where and how far contemporary law differed from Roman law. One could, therefore, argue, *e contrario*, that Huber would have done the same with regard to judicial liability had he contemplated any changes. Finally, in section 2.3.3.12 he recorded the abrogation of the Roman double and triple fines in Friesland, which he was unlikely to have done if his remarks on the liability of the judge were intended to reflect only Roman law.

Other works by Huber, not of the same importance as the *Praelectiones* or the *Heedendaegse Rechtsgeleertheyd*, are his *Positiones Iuris* and his *Beginzelen der Regtkunde*. In the former, which appeared for the first time in 1682, Huber – again following the scheme of the *Institutes* – briefly states at 4.5.2 the position of Roman law according to Justinian. The title of the second work, *Beginzelen der Regtkunde in Friesland en elders gebruikelijk*, which appeared in 1684, raises one's hopes of at last establishing precisely Huber's opinion. However, the passage at 4.3.3 in the *Beginzelen* introduces nothing new; in fact, it is identical with his *Heedendaegse Rechtsgeleertheyd*.

²⁷⁴ “Sodaninge feiten worden vier in Keyserlijke Rechten gemelt; ten 1. Als een Rechter qualijk oordelt...”.

²⁷⁵ See also Stein, *Römisches Recht in Europa*, 166.

It seems that Huber at this stage indeed favoured comprehensive judicial liability for misjudgements. Accordingly, Roman law on this point would appear to have been received without much modification in Friesland. This differs considerably from the view taken by contemporary writers, and underscores the peculiarity of the development of the law in Friesland.

However, Huber's last work, *Eunomia Romana*, sheds new light on the issue of judicial liability. It appeared posthumously in 1700. An earlier edition titled *Disputationes juridicae pro eunomia romana* appeared between 1692 and 1694.²⁷⁶ *Eunomia Romana* is important in our context in two respects: Firstly, Huber does not confine himself to a general outline of the problems as in his other works. Secondly, it is the only work in which he expressly refers to the opinions of Roman-Dutch authorities outside Friesland, as well as to the particular Frisian *usus*.

For a proper understanding of the relevant passage in the *Eunomia Romana*, it is essential to recognise that Huber, in subsection one, was dealing with the state of judicial liability in the Low Countries outside Friesland. It is only in subsection two that he refers to the peculiar Frisian position.²⁷⁷ In this work, finally, it becomes absolutely clear that Frisian law, and Huber's opinion on the requirements for judicial liability outside Friesland, namely in Holland, are not in conformity with the views of other Roman-Dutch authors. In particular, Huber makes reference to the view of Groenewegen, which was analysed earlier.²⁷⁸ Although Huber singled out Groenewegen, he seems to have been well aware that Groenewegen was merely a (leading) exponent of the opinion of Roman-Dutch authorities in favour of the limited liability of judges.²⁷⁹

²⁷⁶ Roberts, *Bibliography*, 161. He reveals that the *Eunomia* contains disputations by students of Huber, *inter alia* even by Van Bynkershoek. Since the first edition is not available in South Africa, it cannot be established who actually disputed the passage under consideration. However, taking into account the predictably strong influence of Huber on his students it appears that at the end of the day the opinions were Huber's. Roberts in his bibliography states with regard to Wissenbach's *Exercitationum ad 50 Pandectarum libros* (1653-1658) at 339: "This work includes a number of his student's disputations, a practice quite common in those days. Possibly because the dissertations with which the pupils obtained their...degree were in fact largely the work of the teacher himself."

²⁷⁷ See generally *Eunomia Romana*, 415.1 and 2.

²⁷⁸ See above at 4.1.3.

²⁷⁹ See *Eunomia Romana*, 415.1: "*Hujus loci jus non servari neque servandum esse, docet Groenewegius, auctoritatibus hominum clarissimorum adductis...Ubi sane plerique Commentatores ita de usu temporum adfirmant...*".

It is obvious from Huber's comments that he not only disagreed with Groenewegen's conclusion – that judicial liability existed only for *dolus* – but that he also rejected Groenewegen's reasoning as unsound:

“Quid est aliud, mores arguere flagitiosae ab Eunomia Romana discrepantiae, si hoc non est? Vel nisi, ut pene videtur, hoc agat ille fatis.”

Huber greatly disliked Groenewegen's freedom of interpretation in abrogating the clear Roman rules of law. Even his efforts to soften his criticism, by asking whether Groenewegen's contentions were advanced ironically, cannot camouflage his complete rejection of the latter's contentions. However, analysis reveals that Huber himself was not arguing entirely without artifice. Where he quoted from Groenewegen's passage in the *Tractatus*, Huber left out those sections where Groenewegen lists his arguments as to why judicial liability ought to be limited to cases of *dolus* – arguments which are not without legitimacy and persuasiveness.²⁸⁰ In addition, it is not easy to see why Huber denied the right of Groenewegen and other writers to abrogate the Roman rules, while (as will be apparent from what follows) he himself advocated at least a partial abrogation.

Meanwhile, the most important passage in Huber's *Eunomia Romana* in this context is that where Huber qualifies the position of Groenewegen and other non-Frisian writers. According to Huber, the liability of the judge outside Friesland had to be distinguished from that within Friesland. Outside Friesland, liability arose for *dolus* and *culpa tamen gravis et inexcusabilis*.²⁸¹ Since *culpa gravis* was equated with *culpa lata*, the liability of the judge was restricted to cases of gross negligence, which, nevertheless, was wider than the scope of liability advocated by other Roman-Dutch writers. Unless the various cities passed local statutes which protected judges from every kind of liability, in order that they might judge without fear of the consequences, these requirements for liability remained the law.²⁸²

²⁸⁰ Huber quotes from Groenewegen's *Tractatus* rather freely. From the passage at *praefertim subalternis* Huber departs from the original text by Groenewegen and summarises the relevant text as follows: “...si toties ipsi tenerentur, quoties iis aliquid per imperitiam aut per imprudentiam exciderit.” Compare Groenewegen's own words at *Tractatus*, Inst.4.5.pr.

²⁸¹ See at *Eunomia Romana*, 415.1: “Enimvero quanquam Magistratus hoc loco etiam lege Aquiliae teneri dicuntur, hoc ita nullo modo capiendum, ut de cujuvis generis culpa teneantur; Sed de factis ejusmodi, quorum in hoc loco exempla referentur, ubi, si forte dolus absit, qui vix est, ut in his speciminibus usque quaque abesse queat, culpa tamen gravis & inexcusabilis subest.”

²⁸² *Ibid.* at 2: “...nisi quod in multis Civitatibus ea Magistratuum municipalium potentia est, ut civum querelas & aliquando Superiorum animadversiones secure contemnant.”

However, in regard to the law of Friesland, Huber once again made the point that in this province the original Roman rules had by no means been abrogated:

*“In Frisia nostra pars haec Eunomiae Romanae adhuc nullo modo sublata est. Neque Magistratum municipalium errores, quales in hoc loco, inexcusabiles, multis & actionibus obnoxii esse desierunt.”*²⁸³

The position of Frisian law was thus identical with that of Roman law as it existed under Justinian and in the days of the Italian jurists.

For the other provinces, Huber argued that liability ought to be for *dolus* and *culpa lata*. He did so despite the counter arguments of Groenewegen and others, namely the argument of lack of expertise as well as the possibility of appeal open to an injured party. That Huber knew about these arguments is clear from his comments in his *Heedendaegse Rechtsgeleertheit*. At 2.1.15.24, he refers to a judge who decides contrary to the laws; in this case, the injured party could lodge an appeal.²⁸⁴ And at 2.1.15.6, Huber demands a high level of ability on the part of judges.

As a judge of the *Hoge Raad van Friesland*, it is more than likely that Huber was aware of the true situation in the courts. However, this obviously served only to moderate his views in regard to liability for *imperitia*. Huber does not provide much justification for his opinion in favour of comprehensive liability. Overall, one is tempted to believe that he was inspired mainly by his purist desire to keep the law as close to its Roman roots as possible.

²⁸³ *Ibid.* at 2.

²⁸⁴ “De plicht van een Rechter in't algemeen is, alsoo recht te spreken gelijk de wetten en ordonnantien mede brengen, anders doende, indien het uitdrukkelijk tegens de wetten is, wort de sententie van aenbegin voer nietig...als 'er misverstant in de sake is...soo moeter appel...angesteld worden.” Interestingly enough, the views Huber expressed with regard to appeal procedures were not very different from Groenewegen's observations in his *Tractatus*. Huber commented for instance in his *Jurisprudence of My Time*, 5.45.2 that: “The reasons for the introduction of appeals are principally three: Firstly, that the judgement of mankind may easily err, and second thoughts are wiser than first; to which one may add that the inferior judges' benches are not so well equipped with wise jurists as the superior tribunals and Courts...”.

4 2 2 Dionysius Godefridus van der Keessel

Since Van der Keessel witnessed at the end of his life the enactment of the Dutch *Burgerlijk Wetboek*, he is commonly regarded, together with Johannes van der Linden, as one of the two last great exponents of Roman-Dutch law.²⁸⁵

Van der Keessel was born at Deventer in 1738 and studied in his mother-city as well as in Leiden, where he was a pupil of G Scheltinga. He graduated in 1761 and soon became professor of law at Groningen. For 45 years, from 1770 until shortly before his death in 1816, he lectured at the University of Leiden on Roman and Roman-Dutch law. Apart from his *Theses Selectae*, that is his lectures on contemporary Roman-Dutch law based on Grotius's *Inleidinge*, Van der Keessel's works were all published posthumously. Well known amongst these are his *Praelectiones Iuris Hodierni*, a fuller version of the above-mentioned lectures, his *Dictata ad Justiniani Institutionum*, the notes of his lectures on Justinian's *Institutes*; and finally his *Praelectiones* on criminal law, that is on books 47 and 48 of the *Digest*. Van der Keessel's importance is enhanced by the fact that his works provide a good overview of the final position of Roman-Dutch law at the dawn of a new era.

Although Van der Keessel expressed a brief opinion on the liability of the judge in his *Theses Selectae*²⁸⁶, attention should be focused, rather, on his comments on the subject in the *Praelectiones* and the *Dictata*, which are more comprehensive and not essentially different. These comments are of particular importance for two very different reasons. Firstly, Van der Keessel appears to be the only author who tried to shed new light on the historical reasons in Roman-Dutch law for the restriction of judicial liability to cases of *dolus*. Secondly, Van der Keessel advocated a stricter control over the judiciary by means of a wider scope of liability in cases of judicial misjudgement.

²⁸⁵ De Wet, *Ou Skrywers*, 162 paints a rather sombre picture of the achievements of Roman-Dutch law in what he called its last sixty years: "Die jare na van Bynkershoek was maer jare vir die Romeins-Hollandse reg. Met die uitsondering van Van der Keessel ...[en] Van der Linden, was daar nie skrywers wat werklik groot genoem kan word nie, en selfs hierdie twee was naklanke wat hulle verdienstelik gemaak het deur aanvulling van werke uit de bloeitydperk en nie deur werke van eie opset en ontwerp nie." For more biographical details see Feenstra, *Van der Keessel*, 343; Zimmermann, *RHR*, 47-48 and fn192 with further references; Roberts, *Bibliography*, 172, De Wet, *Ou Skrywers*, 172-173, De Wal, *Biographic Sketch*; Dekkers, *Bibliotheca*, 91; Van Heijnsbergen, *Geschiedenis*, 114; De Vos, *Regsgeschiedenis*, 211-213; Van Zyl, *Geskiedenis*, 392-394.

²⁸⁶ Note Th.808.

In the first place, Van der Keessel does not attribute the restriction of judicial liability to cases involving *dolus* merely to Van Leeuwen's 'appeal argument'. He rather introduces into the discussion the different starting point of Groenewegen's forensic considerations such as the 'ability argument'. In this respect, Van der Keessel pays attention to external historical influences including the specific procedural developments that rooted in France with regard to the so-called *intimatio*. In Dutch procedural law, it was generally held that every person in the judgement *a quo*, either as one of the parties or as judge of the inferior court, had to appear before the superior court hearing an appeal (*intimatio*).²⁸⁷ With reference to De Timmermann, Van der Keessel states that according to French customary law it was common practice to call in judges to defend their judgements personally in court when a party felt deprived of justice.²⁸⁸ When a judge was held to have denied justice, he was sentenced to payment of a fine and to reimbursement of the injured party. However, with the introduction of written law, that is Roman law, this practice came to a halt and applied only to those judgements that were still based on (ancient) customary law.

It is evident that Van der Keessel was referring to developments touched upon here earlier in discussion of the medieval roots of the French *prise à partie*.²⁸⁹ He did not go as far as to accept the *prise à partie* in Roman-Dutch law, but he argued that this restriction of the concept of *intimatio* to cases not involving Roman law was closely related to the opinion of later Roman-Dutch authors in favour of a restricted scope of judicial liability for misjudgements. In both cases, the use of Roman law exempted the judge from certain strict consequences: in the first case, from having to appear in court at the appeal session; in the

²⁸⁷ See De Damhouder, *Practycke in Civile Saecken*, 59.16: "In materie van Reformatie ofte appel doet den Erecuteur syn citatie of syn commissie inde Raedthuysen of Vierscharen aan den persoon van den Maenderherre, Magistraten, Schepenen of die Rechters van welckers sententie geappelleert werdt, om dat se haer ghewesen sententie moeten sustineren...". See further Van Leeuwen, *Censura Forensis*, 2.2.13.21 and *Rooms-Hollands Regt*, 5.25.10: "Voorts wird in alle appellatien of reformatien onderhouden, dat den Regter die het vonnis of de sententie heeft gewesen, beneven de Partyen wird geroupen en versorgt, dat hy me de saak komt verabtwoorde...vulgo inchimatie." For the reception of the *intimatio* in Flanders and its penetration into Roman-Dutch law see Monballyu, *TR* 61 (1993), 238-240 and 278.

²⁸⁸ *Praelectiones Iuris Hodierni*, 3.37.9. De Timmermann, *Costumen*, 6.4. Little is known about De Timmermann. He appears to have lived in the 18th century. He graduated *doctor iuris* at the University of Utrecht in 1748 and was an advocate, later also *pensionaris* of the city of Middelburg. See the introduction of his work cited here. See also Dekkers, *Bibliotheca*, 171; Roberts, *Bibliography*, 304 without further biographic comment. With regard to the situation in France see Imbert, *Institutions*, 2.642 and De Damhouder, *Practycke in Civile Saecken*, 59.18: "In Franckryk gebruykelyk...".

²⁸⁹ See above at 4 | 3 2.

second case, from the imposition of civil liability for misjudgements committed with *imperitia*.

Thus, on historical grounds Van der Keessel came to the conclusion that in the eyes of some Dutch jurists the introduction of the comprehensive Roman law had rendered the task of the judiciary extremely difficult. Accordingly, writers strongly favoured the mitigating of negative consequences for a judge who applied Roman law on a large scale. This is certainly an interesting explanation of why in the early seventeenth century Roman-Dutch jurists abandoned the traditional Roman law approach to judicial liability. Van der Keessel was the first author on Roman-Dutch law to throw light on the neglected issue of the possible reasons for this sudden upheaval.

There is, nevertheless, an additional nexus of *intimatio* and civil delictual liability for misjudgements which Van der Keessel did not draw on. The Dutch *usus modernus* apparently provided for a regulation whereby the judge *a quo* had to pay at least half of the costs of the appeal and a fine (which, according to Monballyu, came to 60 pounds in Flanders well until 1795) when he was subject to *intimatio* and the appellant's appeal was upheld.²⁹⁰ Further, Willem Schorer tells us in his *Aanteekeningen*²⁹¹, with reference to Pieter Stockmans, a writer from the southern provinces²⁹², that inferior judges who had been called upon to defend their judgements had to recompense the appellant if, despite the success of the appeal, the latter remained disadvantaged; for instance, if the opposing party had disappeared or become insolvent.²⁹³ Apparently, the appellant was not, for a second time, to suffer a financial burden caused by an obvious misjudgement in the court *a quo*.

The consequences of *intimatio* and appeal, hence, were twofold: It is evident that, in the eyes of the superior court, the reversal of the judgement implied a judicial mistake in that the

²⁹⁰ TR 61 (1993), 273: "Afen toe verklaarde de Raad van Vlanderen het appel of het reformatieberoep wel ontvankelijk en gegrond, en werden de gedaagde rechters in het ongelijk gesteld. In die gevallen weerd voorerst het vonnis a quo vernietigd en hervormd. De geintimeerde partij wird veroordeeld tot de processkosten in eertse aanleg. De proceskosten in hoger beroep werden verdeeld tussen de geintimeerde en de in het ongelijk gestelde rechters. Wegens het wijzen van een slecht vonnis liepen de lagere rechters bovendien een boete van zestig ponden parisis op."

²⁹¹ At 3.37.9.

²⁹² For details see De Wet, *Ou Skrywers*, 123; De Vos, *Regsgeschiedenis*, 268; Van Zyl, *Geschiedenis*, 381 and Roberts, *Bibliography* 293-294.

²⁹³ *Decisionum Curiae Brabantiae*, 144.6.

judge *a quo*'s findings of fact and/or law were not in accordance with the valid law. Thus, the judge had to mitigate the consequences of his mistake by paying a portion of the additional costs the appellant had suffered on appeal. Consequently it may be said that, if Stockman's and Monballyu's assertions reflect the practice of the courts, the legal consequences of a successful appeal amounted to a form of civil liability of the judge: There can be no doubt that under these circumstances *intimatio* and appeal procedures posed an additional threat (besides that of ordinary delictual action) to the Roman-Dutch inferior judge.

However, leaving aside lofty theory, there are indications other than Van der Keessel's explanation of the growing comprehensiveness and difficulty of the law that *intimatio* ceased to be used as frequently during the seventeenth century as in late medieval times.²⁹⁴ Trotz, an eighteenth century professor at the University of Franeker²⁹⁵ indicates an alternative reason in the heavy workload of the inferior courts, to which appearances before the superior courts were an extra burden. He argues, further, that since court records had become more precise another reason for the strict application of the old rule had vanished.²⁹⁶

What Van der Keessel omits to tell us is that the growing suspension of the *intimatio* did not necessarily apply in cases of serious error on the part of the judge *a quo*. From De Timmermann's *Costumen, Ordonnantien en Statuten der Stadt Middelburg in Zeeland* we learn that as late as 1772 the famous passage of Mary of Burgundy's Privilege from 1476 remained in force, namely:

“Het en sy dat hen beliest ten ware oy yemandt wilde doen blyken dat die voorsz. Eerste jugen by corruptie oft openbaerlyck ende klarlyck tegen de Privilegien van der Plecken haer Vonnisse gegeven hadden, in dien ghevalle souden sy gehouden wesen haer Vonnisse alsoo gegheven te sustineeren.”²⁹⁷

Evidently notorious (*openbaerlyck ende klarlyck*) misjudgements and/or misjudgements resulting from corruption still had to be defended by the judge *a quo* on appeal.²⁹⁸ Bearing in

²⁹⁴ Merula, *Manier van Procederen*, 1.3.3.3: “Voor dezen is wel gebruikt geweest, dat de Rechters haare Vonnissen moesten sustineren...dan't zelve wordt nu niet meer geuseert.”

²⁹⁵ See Van Zyl, *Geskiedenis*, 406; Van Heijnsbergen, *Geschiedenis*, 106; Dekkers, *Bibliotheca*, 172 and Roberts, *Bibliography*, 307 for details.

²⁹⁶ Note Trotz' comments in his *Commentarius Legum Fundamentalium*, 10.16: “Valde etiam molesta haec erat defensio iudici minori in tam foecunda appellationum mmesle, damnosa etiam propter novas expensas, immo supervanea plane, quia acta & probata simul transmittantur.”

mind on one side the opinion of Stockman and further what Monballyu has stated on the issue, and on the other taking account of the increasing tendency towards ignoring *intimatio*, a likely explanation of the overall situation is that the legal consequences of *intimatio* continued to exist until 1795 but were not put into practice except in extreme cases, as appears from De Timmermann's annotations.

Meanwhile, the obvious resemblance between notorious wrong judgements and *dolo* wrong judgements is persuasive. As we know, the latter category for all practical purposes remained the only one in which judicial liability in delict arose in Roman-Dutch law. This connection between *intimatio*, appeal and civil liability for wrong judgements, hence, is an interesting alternative view, which Van der Keessel to some extent overlooks.

As regards the second interesting aspect of Van der Keessel's commentary, namely his views on the scope of judicial liability, he held that a judge would be held civilly liable in the first instance for *dolus*. This is in accordance with the Dutch *communis opinio*. What deserves attention is the significant difference from the *communis opinio* of Van der Keessel's view on the debated issue of liability for *culpa*. Van der Keessel accepts Huber's views on judicial liability outside Friesland and approves of additional civil liability for a judge even where the misjudgement is due to *culpa lata* (gross negligence).²⁹⁹ His opinion represents a marked extension of judicial liability. However, in comparison with the position of Roman law or of the Glossators and Commentators, or the position in Friesland according to Huber, his view of liability was still relatively restricted in that not all forms of *culpa* sufficed to establish liability, only *dolus* and *culpa lata*.

In the time of Van der Keessel, thus, Roman-Dutch law faced two bodies of opinion on the exact scope of judicial liability. Acknowledging the eminence of the advocates for the *culpa lata* argument, Huber and Van der Keessel, the question arises as to why it was felt necessary to retain stricter control of the judiciary by the threat of liability for *dolus* and *culpa lata*. Nowhere, however, does Van der Keessel provide us with a detailed explanation as to the

²⁹⁷ *Groot Placaet-Boek*, vol.II 662.

²⁹⁸ De Timmermann, *Costumen*, 6.4

²⁹⁹ *Praelectiones Iuris Hodierni*, 3.37.9 *ad fine*: "...sed et si dolus ibi non plene probatus esse videatur, existimarem culpam latiore ibi ad condemnandum iudicem sufficere..." See also *Theses Selectae*, Th.808. For the reception of the concepts of *dolus* and *culpa* in general in Roman-Dutch law see the text above at 3 fn 114 *et seqq.*

underlying reasons for his view, whether predominantly for legal-political or for dogmatical considerations. In the case of Huber, the reason appears to have been dogmatic or, rather, purist (Roman) tendencies.

Van der Keessel might not have been sufficiently convinced to follow to its conclusion a far-reaching qualification of judicial liability. Obviously, he was not willing to advocate judicial liability for every form of carelessness on the part of the judge that resulted in damage to a party. On the other hand, he was convinced that judges should be liable for *culpa lata*, making it necessary for them to fulfil their duties with at least some degree of care. An explanation is that Van der Keessel was influenced by Grotius, but he did not wish to go as far as Grotius. Hence he chose a middle way: liability for *culpa lata* but not for *culpa levis* or *imprudentia*.

One aspect is certain, however. Huber's and Van der Keessel's view cannot be reconciled with the application of the *actio de dolo*. It appears from their wider notion of judicial liability that they favoured the use of the *actio legis Aquiliae* or the *actio in factum* in civil claims against judges for civil liability. Unlike Huber, Van der Keessel in his *Theses Selectae* and his *Praelectiones Iuris Hodierni* seemed to exclude the liability of judges from the group of quasi-delicts. In this regard, Van der Keessel again appears to have been inspired by Grotius, whose *Inleidinge* formed the basis of the two works.

Since Van der Keessel did not fully support Grotius on the state of mind required for judicial liability, this appears to be the time to focus on the solution provided by Grotius.

4.3 Liability for every kind of culpable conduct or omission: Hugo Grotius's view:

The only author besides Huber (however, only for Frisian law) to advocate liability for every kind of culpable conduct or omission by a judge was Hugo Grotius.

Hugo Grotius was born in 1583 and died at the age of 62 in 1645.³⁰⁰ His genius was recognised from his earliest years. At the age of 11 he began his studies at Leiden; at 15 he

³⁰⁰ The biographic literature on Grotius is immense. Only a selection can be included here. For a lengthy biography, see Knight, *Hugo Grotius*. For a bibliographic overview on works about Grotius, see Feenstra, *Grotius*, 260; Van Zyl,

graduated as *Doctor Iuris* from Orleans; at 16 he commenced practice as an advocate; and at 24 he held the widely respected and sought after position of Advocate Fiscal. His career in the Low Countries seemed destined to fulfil the highest expectations, but experienced a severe blow when he became involved in the great religious controversy which then raged in the Calvinistic Netherlands. The upshot of this was that Grotius was sentenced to life imprisonment. However, he managed to escape from prison in Loevestein castle in 1621 and spent the rest of his life in exile, mainly in France.

Grotius was the most eminent of all Dutch jurists. His great fame as a jurist is based especially on two works.³⁰¹ The first is his *De Iure Belli ac Pacis* (1625) which made him one of the most famous jurist of the rationalist, natural law school. Some six years later, his *Inleidinge tot de Hollandsche Rechts-Geleertheyd* (1631) appeared. This work established Grotius as the father of Roman-Dutch law. It was written in Dutch rather than Latin and it was concerned with modern Dutch rather than Roman law. Thus, the legal material was at last made available to the ordinary practising lawyer. Of even more importance is what Professor Carey Miller has described as follows:

“...the primary factor must, surely, have been the original, clear and concise nature of the work and its departure from the complex and prolix *Digest* based type of work. The *Inleidinge* was almost like a code in that it introduced a fresh start and eliminated the dead wood of the past.”³⁰²

Its influence has been immense.³⁰³ The fact that other important Dutch jurists based a number of works and lectures on the *Inleidinge* has already been mentioned.

Geschiedenis, 346-352 and fn367. See further the references in Zimmermann, *RHR*, 26 *et seq*, as well as the proceedings of an international colloquium organised by the Grotius committee under the title: *The World of Hugo Grotius*, Feenstra, R (ed) Amsterdam (1984). Further Kunst, *Historische Ontwikkeling*, 106-108; Dekkers, *Bibliotheca*, 69; Roberts, *Bibliography*, 139; Hahlo and Kahn, *Legal System*, 550; Stein, *Römisches Recht in Europa*, 162-164, De Wet, *Ou Skrywers*, 128-132.

³⁰¹ Grotius wrote a number of other highly influential legal books. For example his *Mare liberum* (1609) is one of the most famous works ever written on maritime law. Noteworthy also is his *De jure praedae* (1868) or his *Opinions* which appeared mostly in the *Hollandsche Consultatien* (1646-66).

³⁰² Carey Miller, 1982 *Acta Juridica*, 99.

³⁰³ Wessels, *History*, 263 can be quoted as follows: “The influence of the Introduction on the subsequent development of Roman-Dutch law may be compared with that of the *Institutes* of Justinian upon the spread of Roman law.” With regard to the emergence and importance of the *Inleidinge*, see Wellschmied, *Hugo Grotius' Inleidinge*. See also by the same author *ZSS* 69 (1952), 155 *et seqq*.

Of his works, only the *Inleidinge* provides us with information about Grotius's position on the liability of the judge. As indicated earlier, Grotius discusses the various cases of quasi-delictual liability in Chapter 38 of the third book of the *Inleidinge*. It is striking that he did not include the liability of the *iudex, qui litem suam fecit*, in this passage.³⁰⁴ Instead, we find the liability of the judge discussed in Chapter 37, which deals with wrongful acts against property. At 3.37.9 we read:

“A judge who decides contrary to laws which it was his duty to know or grants an adjournment contrary to law...though [he] may have acted in ignorance, [is] liable for any damage which anyone may incur in consequence.”

According to Grotius's doctrine, the underlying principles of delictual liability, or more specifically wrongs against property (*misdaed tegens goed*), derive from the elements of the superior *ius naturale* which, in turn, influenced positive (civil) law.³⁰⁵

To recap: unlike cases of quasi-delictual liability which were attributed to delictual liability due to various *wettelicke oorzaecken*, genuine delicts required wilful conduct.³⁰⁶ By removing the liability of the judge from the sphere of the quasi-delicts and incorporating it in the category of true delicts, wilful and unlawful conduct was required before liability arose.³⁰⁷ According to 3.32.5, together with 3.32.3 and 3.32.14, a judge who decides contrary to the laws fails to perform the duties of his office properly, which in Grotius's view constitutes an act that “...from its own nature [is] unlawful...”.³⁰⁸ The emphasis laid on the duty aspect derived from Grotius's general focus on the injurer rather than the injured. Hence, a person could only be held liable when he had not done what he ought to have done, or if he had done what he ought not to have done.³⁰⁹

Apart from the incorporation of judges' liability in the category of true delicts, a second important aspect needs to be noted. Judicial liability on the basis of Grotius's theory of a generalised fault requirement implied that liability existed for every kind of culpable conduct

³⁰⁴ Hochstein, *Obligaciones Quasi ex Delicto* is aware of this peculiarity, although his conclusion on page 104 at fn64 has to be relativated in so far as Grotius does not generally neglect the liability of the *iudex* but incorporates it under the delictual liability for wrongs against property in 3.37.9 of his *Inleidinge*.

³⁰⁵ For more details see Feenstra, *Inschuld, Schuld en Verbintenisse*, 464 fn30.

³⁰⁶ See the text above at 3 following fn142.

³⁰⁷ See Grotius, *Inleidinge* (1939), 3.32.5, 6, 9, and also 11 and 20.

³⁰⁸ *Inleidinge* (1926).

³⁰⁹ Zimmermann, *Law of Obligations*, 1033-1034.

or omission. Even a misjudgement due to mere ignorance of law was sufficient if damage resulted: “...alwaer het door onverstand...”.³¹⁰

Grotius thus introduced a wide scope of judicial liability in his system. Taking the above two aspects of Grotius’s reasoning into account, it is clear that breach of duty was the central reason for the imposition of judicial liability. The introduction of an element of duty was revolutionary and puts Grotius ahead of his fellow writers. However, by way of criticism, it could be said that Grotius defined only a general standard of duty and not the exact scope of the duties of a judge. The counter argument to this is that these duties had already been defined elsewhere, for instance in the *Instructien van de Hove van Holland* or by the oaths of the *schepenen* and *magistraten*.³¹¹

Be that as it may, several questions remain. It has been said that Grotius’s *Inleidinge*, to a large extent, provided a realistic overview of Roman-Dutch law in the first half of the seventeenth century.³¹² With regard to the liability of judges, however, Grotius appears hardly to have considered practical details. Grotius did not comment either on the important aspect of the availability of appeal or make any acknowledgement of the ‘education argument’. It is regrettable that Grotius did not discuss these arguments in his *Inleidinge* since, after some years of practical experience as an advocate and court official, he must have been aware of the true state of affairs within the judiciary. One possible explanation is that Grotius, with respect to the question of liability, was determined to present a purely dogmatic solution.

It has been suggested³¹³ that to some extent Grotius’s wide concept of judicial liability might have been inspired by a passage in *De Iustitia et Iure*, a work by the Spaniard Domenico Soto, which included a separate *articulus* titled: “*Utrum iudici liceat contra veritatem quam*

³¹⁰ Grotius, *Inleidinge* (1926), 3.37.9. On the other hand, Grotius in his *De Iure Belli ac Pacis*, 2.20.43 favoured the possibility of excusing *inevitabilis ignorantia legis naturae*. It might be, however, that this applied only to *legis naturae* in a narrow sense.

³¹¹ See the text above at 4 and fn157 *et seqq.*

³¹² Zimmermann, *RHR*, 29-30 with further references.

³¹³ Hartog, *Onrechtmatige Overheidsdaden*, 22 fn6.

certo novit, iudicare, quando legitime probatur contrarium.”³¹⁴ Another source of inspiration may have been Prospero Farinaci (1554-1613), an Italian lawyer frequently quoted by Dutch jurists during the republican era.³¹⁵ Farinaci, after discussing the views of other authors in his *Praxis et Theoria Criminalium*, offers the view that a judge is liable for a wrong judgement due to ignorance (*imperitiam*). However, Farinaci was not specifically cited by Grotius in his work.³¹⁶ Moreover, it seems that Farinaci’s view was influenced by the Italian school of judicial liability, which, as we know, favoured liability for both *dolus* and *imprudencia*.

The most likely stimulus for Grotius’s original ideas on the liability of the *iudex* appears to be the relevant passages by Donellus.³¹⁷ The influence of Donellus, who himself wrote not on Roman-Dutch but on Roman and French law, appears to have been twofold: firstly, Donellus removed the liability of the *iudex, qui litem suam fecit*, from the group of quasi-delicts. To Donellus, quasi-delictual liability was similar to ordinary delictual liability. It arose either where the damage had not yet occurred but was likely to occur or, secondly, where the damage was attributed to someone who did not cause the damage personally. The *culpa* of the *iudex* on the other hand amounted to a special *culpa in faciendo*. The judge who gave a wrong judgement clearly caused direct damage which, consequently, gave rise to delictual and not merely to mere quasi-delictual liability. Hence, judicial liability amounted to delictual liability and not to mere quasi-delictual liability.

Secondly, Donellus considered that a judge could be held liable for mere *imperitia*: If the Aquilian rule *imperitia culpa adnumeratur* applied even to ordinary private persons, it should apply *a fortiori* to cases where honest and reliable men – as in the case of the *iudex* – were called to public office and caused damage due to ignorance of the law.³¹⁸

³¹⁴ Soto, *De Iustitia et Iure*, 5.4. II at 403 *et seq.* Soto’s work was part of a consignment of legal literature used by Grotius for the writing of his *Inleidinge*, which was brought in the famous bookcase that was used by Grotius in his escape from Loevestein castle, see Feenstra, *Quelques Remarques*, 78 and fn70.

³¹⁵ See Roberts, *Bibliography*, 15 and 119.

³¹⁶ Farinaci’s work includes much more detailed annotations than the one mentioned by Hartog. It is a typical commentary of the *mos italicus*. Altogether there seems to be not much reason for Hartog to conclude that Farinaci in particular influenced Grotius.

³¹⁷ Donellus, *Commentariorum*, 15.47. For an in-depth analysis of Donellus’s influence on Dutch jurisprudence in general and Grotius in particular see Feenstra, *Hugues Doneau*, 231-243.

³¹⁸ Donellus, *Commentariorum*, 15.27: “*Nam et haec ipsa imprudentia culpa est: injuria est, quae non minus vindicatur eadem illa lege Aquilia; et cum vindicatur non minus dicitur actio ex maleficio...Quod si imperitia in privatis culpa est, et*

Although we can trace some influence to Donellus's work, it appears that Grotius's views on the nature of quasi-delicts and on the liability of judges are an advance on those of Donellus.³¹⁹ Similarly, Grotius's approach to judicial liability is quite distinct from that of his fellow Roman-Dutch jurists, the slightest *culpa* that led a judge to a breach of duty being sufficient for liability. In the end, Grotius's view remains in accordance with the position of Roman law and the Glossators and the Commentators, and also with Huber's view in respect of Friesland. His reasoning, however, is considerably different.

4 4 Damages

Having dealt in depth with the opinions of various writers with regard to the requirements for judicial liability under the *actio legis Aquiliae* and the *actio de dolo*, the question remains of the legal consequences of a judge being found liable for misjudgement.

It was indicated earlier that, from the seventeenth century onwards, the *actio legis Aquiliae* gradually shed its penal characteristics and became a purely compensatory or reipersecutory action.³²⁰ Two questions are of relevance in this regard. First, what was the scope of compensation of the *actio legis Aquiliae* in Roman-Dutch law? Secondly, how were the damages measured?

In a nutshell, Roman-Dutch law accepted to a large extent that, in specific circumstances, the Aquilian action lay for the recovery of purely economic loss, that is patrimonial loss without physical injury to the person or the property of the plaintiff. This was markedly different from Roman law. In Roman law, with regard to economic loss, the plaintiff could expect compensation only if he showed that a particular item of his property had been affected by the defendant's act. Obviously, this did not include pure economic loss as such. At the time of the Commentators, however, there was a tendency to extend the application of the *actio legis Aquiliae* or at least its extension, the *actio in factum*, to instances where the plaintiff had

cum per imperitiam quid ab his peccatur in res alienas, delictum: quantum maior est haec culpa, et gravius delictum in iudice, quem ut virum bonum et ad jus dicendum publice constitutum minime omnium, iuriam facere oportebat?"

³¹⁹ See also Feenstra, *Deliktsrecht bei Grotius*, 435.

suffered patrimonial loss without loss or damage to a particular item of his property. This view was based upon a wide interpretation of *Inst* 4.3.16 where it was stated:³²¹

“If, though, neither the damage be inflicted by a direct act nor the body be injured but loss be inflicted on someone in some other way...it became accepted that an action on the facts of the case is available.”³²²

Since Roman-Dutch lawyers generally agreed that in practice there was no longer any difference between the extended *actio in factum* and the *actio legis Aquiliae*, the Aquilian action was on a long but steady course towards becoming a general comprehensive remedy for the recovery of damages for every wrongdoing, including negligent or deliberate infliction of pure economic loss. Whether this development had already in the days of Voet and other writers progressed to the point where the

“...action *in factum* was no longer confined to cases of damage done to corporeal property, but was extended to every kind of loss sustained by a person in consequence of the wrongful acts of another...”³²³,

as claimed by De Villiers CJ in *Cape of Good Hope Bank v Fischer*, is a moot point.³²⁴

How then did the Roman-Dutch authors measure the damage for misjudgements in particular? As in Roman law and in the Italian *ius commune*, the assessment depended in the first place on the form of fault. In other words, most authors adopted the notion that the amount of compensation depended on whether the judge had acted with *dolus* or with *culpa/imperitia*. Those authors who favoured a rather traditional approach, namely judicial liability for *culpa (lata)* or even *imperitia*, considered that the judge was “...gebreukt nae goetvinden van het Hoff, zelden meer als in de kosten van't proces.”³²⁵

Those authors who argued in favour of liability merely for *dolus* naturally assessed damages according to the given formula *veram aestimationem litis*. Like the Glossators and Commentators, the Roman-Dutch lawyers were not precise in defining what they understood under *veram aestimationem litis*. However, from the absence of contrary opinion it may be

³²⁰ See above 3 text at fn82 *et seqq.*

³²¹ Zimmermann, *Law of Obligations*, 1023; Kaufmann, *Actio Legis Aquiliae*, 46 *et seqq* and 62 *et seqq.*

³²² Quoted from Thomas, *Institutes*.

³²³ (1886) 4 SC 368 at 376.

³²⁴ See *inter alia* Pauw, *De Jure* 8 (1975), 23 and 25; Van der Walt, 1979 *TSAR*, 145 *et seq*; *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) 830. Most recently Hutchison, *Aquilian liability II*, 609-610.

³²⁵ Huber, *Heedendaegse Rechtsgeleertheit*, 2.3.3.5.

said that this covered all patrimonial loss caused by the wrong judgement; including the costs of litigation, expenses and foregoing of prospective gains, in other words the *totum interesse*.³²⁶ According to Groenewegen, the costs of the suit were determined by the court in accordance with the customs of the place on a good and equitable basis.³²⁷

Christianaeus and Voet merely refer to *litis aestimationem*³²⁸ and, in his *Beginselen des Rechts*, Voet states:

“Doch zoo wanneer een rechter door bedrog en ter quader trouwe qualyk zal hebben gevonnist...tot schaedelooshouding des beledigde moet worden verwezen.”³²⁹

Vinnius says merely that a judge who judged with *dolus* was obliged to make good the amount his injury caused.³³⁰ Huber adds that a judge: “...moet alle den hinder ende kosten boeten.”³³¹ And, from an *Advys* by a group of advocates from The Hague in 1722, it appears that the erring judge was obliged to: “...vergoeden, alle de schaden, en kosten, die hy [the plaintiff] wegens des Praesidents versojelyk gedrag heeft geleeden...”³³²

The formula *veram aestimationem litis* obviously applied under the *actio legis Aquiliae*. To see how this formula was reconciled with the measure of damages under the *actio de dolo*, the other action that found approval among some of the Roman-Dutch jurists, it is necessary to investigate how and what kind of damages were measured under the *actio de dolo*. It has been said above that in Roman law the *actio de dolo* always applied as a subsidiary action and that from its earliest days it was directed towards simple compensation (*simplum*) for all loss, including pure economic loss.³³³ Obviously, the Roman-Dutch jurists accepted the *actio de dolo* in much the fashion described by Van Leeuwen in his *Censura Forensis*:

³²⁶ See above chapter IV 3 6 1.

³²⁷ Groenewegen, *Tractatus*, C.3.1.15.

³²⁸ Christianaeus, *Decisiones Curiae Belgiae*, 4.49.95.1: “Et sic dicendum, iudicem dolo vel precibus ductum a recto iustitiae deviantem tramite at que ita inustam proferente sententiam, parti in litis aestimationem condemnandum esse.” Voet, *Commentarius*, 5.1.58.

³²⁹ *Beginselen des Rechts*, 4.5.5.

³³⁰ Vinnius, *Ad Institutionum*, 4.5.pr.3: “Dolus iudicis ut verum & infame delictum severius vindicatur: nam qui largitione, odio, vel gratia depravatus iniquam sententiam dixisse arguitur...& veram litis aestimationem ei, quem laesit, praestare cogitur.”

³³¹ Huber, *Heedendaegse Rechtsgeleertheyt*, 2.3.3.6: “...ende moet alle den hinder ende kosten boeten.”

³³² *Nieuw Nederlands Advys-Boek*, n.46 at 509.

³³³ Kiefer, *Aquilische Haftung*, 13; Näf-Hofmann, *Actio de Dolo*, 11; Kaufmann, *Actio Legis Aquiliae*, 15 and 105.

"The action for fraud is an equitable one, depending on the discretion of the judge, available to the person who has been cheated by the fraud, its subject the thing he has lost, and its object the fraudulent person himself...The action is available to secure what has been lost through fraud, so that it must be restored in its full extent..."³³⁴

Consequently, we can say that with regard to damages for *dolo* misjudgements the *actio de dolo* and the *actio legis Aquiliae* were identical.

Grotius's approach is, once again, different in that it is based on his general theory of delictual liability. Grotius in his *Inleidinge* states:

"The duty of compensation attaches to all who have injured another by any wrongful act...so far as any one has been injured thereby."³³⁵

The duty to compensate is one of the foremost duties which the law of nature imposes on mankind.³³⁶ With regard to judicial liability, consequently, compensation covered every loss experienced by the injured party in consequence of the judge's misjudgement:

"A judge who decides contrary to the laws...[is] liable for any damage which any one may incur in consequence."³³⁷

Finally, with respect to the question whether or not there existed an alternative opportunity to hold the state liable for the misconduct of officials, Cilliers and D'Oliveira have made the point that:

"In Roman-Dutch law a limited notion of public liability is to be found in respect of the state as fisc in proprietary or money matters. It was not always certain, however, as a matter of form, whether the state as such or its officer personally was liable in damages. The latter was more probably the position."³³⁸

From what we have said above we can ascertain that judicial liability was clearly the personal liability of the judge.³³⁹

³³⁴ Simon van Leeuwen's *Roman-Dutch Law*, 1.4.42.2 and 4. See also Huber, *Heedendaegse Regtsgeleertheit*, 4.39 and Voet, *Commentarius*, 4.3. De Vos, *Acta Juridica* 7 (1964), 28-31 rather focuses on the consequences for contractual obligations.

³³⁵ Grotius, *Inleidinge* (1926), 3.32.12: "Tot weder-evening dan zijn gehouden alle die iemand door misdaed hebben verkort...voor soo veel iemand daer is verkort..."

³³⁶ Kiefer, *Aquilische Haftung*, 80.

³³⁷ Grotius, *Inleidinge*(1926), 3.37.9: "Een rechter wijzende jegens wetten...zijn gehouden in alle schade die iemand daer door kommt te lijden."

³³⁸ Cilliers and D'Oliveira, *State Liability*, 221.

³³⁹ Hartog, *Onrechtmatige Overheidsdaden*, 10, 22 and 106-108; Cilliers and D'Oliveira, *State Liability*, 221. Note also the judgement by Connor CJ in *Muirhead & Co v Ayliff* 1875 NLR 31 at 36: "Under Roman Law certain magistrates were liable to private individuals for negligence...The Dutch jurists...say that this is no longer the law, except when there is *dolus*...but they make no suggestion that the liability is transferred to the State."

4.5 Conclusions

All but two of the Roman-Dutch jurists assessed in the preceding pages leave no doubt that liability of judges in cases of judicial mistakes was, under no circumstances, considered appropriate for every kind of culpability. This point of view is a manifestation of a development that first came to the fore in France in the early sixteenth century owing to specific French constitutional and institutional elements. It represents a clean break with the law as it stood and, in the end, made it almost impossible to sue a judge successfully for damages. None of the Dutch jurists saw this more clearly than Johannes Voet who made it plain that, due to difficulties in leading evidence, judicial liability was generally rare:

“But in our customs and those of many other nations it is rather rare for the judge to make the suit his own by ill judging.”³⁴⁰

Consequently, it may be said that two important tendencies had crystallised by the early seventeenth century. Firstly, judicial liability, understood in the sense of professional liability, disappeared. The judicial office was increasingly understood as an exceptional office within the hierarchy of government institutions. Secondly, the reform launched in France by the introduction of the *prise à partie* made it abundantly clear that the scope of judicial liability depended on the relationship between the judges and their ruler. Both ruler and judges considered judicial liability as a means of control and discipline which – depending on the point of view – had to be expanded or limited.

The specific course of development in the Netherlands after the revolution is strong evidence of the truth of this argument: shortly after an end was made to Habsburgian near-absolute rule, Dutch writers took the baton from the French and became the pacemakers for the drastic limitation of judicial liability. This race, to sustain the metaphor, should be seen as the eliminating heat for the final race which began with the spread of the ideals of the Enlightenment and the consolidation of Montesquieu's theory of separation of powers as the basis of modern constitutional theory. The time was now ripe for the full expansion of the doctrine of judicial independence – a doctrine which entailed not only the wide field of the independence of the judiciary from the other branches of government (in terms of nomination, appointment, tenure of office, removal or transfer from office, remuneration, freedom of decision, disciplinary accountability, etc.) but, equally, a judge's independence from the

³⁴⁰ Voet, *Commentary*, 5.1.58. Affirmed by Van Poelgeest's observations in *Bijdragen* 103 (1988), 40.

parties before him in court. The argument of judicial independence, along with what the ‘appeal argument’ (possibility of appeal procedures in both civil and criminal cases), led to the permanent qualification of judicial liability in nearly every legal system based on the civil law.

That Roman-Dutch law did not quite reach this final point of development is evident from the important differences that emerged in the writings of the Dutch jurists. To start with, the absence of appeal procedures in criminal cases stunted at least one arm of the argument against a wider scope of judicial liability. Secondly, the diversity that Roman-Dutch law of judicial liability had reached – under an apparently smooth surface – is clearly visible in the fact that not all the authors who adhered to the approach that liability for judicial mistakes was only for *dolus* favoured the application of the *actio legis Aquiliae*. Groenewegen and Van Leeuwen, for instance, favoured the *actio de dolo*. In addition, those authors who dealt with the aspect of denial of justice – Groenewegen, Voet, Wassenaar – also considered the *actio de dolo* as appropriate.

This difference in detail surfaces in the approach of the renowned jurists Huber and Van der Keessel. These writers held that judicial liability for judicial mistakes was for *dolus* and *culpa lata*.³⁴¹ Depending on one’s point of view, this approach may be seen either as an extension of liability (compared with the opinion described above) or as a less drastic restriction of the Roman and Italian *ius commune*’s scope of judicial liability.

Finally, reference must be made to Hugo Grotius, who favoured the retention of a comprehensive judicial liability based on fault, that is for *dolus* and any form of *culpa*. This approach, not shared by any other writer³⁴², derived from his novel natural law theory of delictual liability rather than from a simple adoption of the position taken by Roman law. From Grotius’s comments in the *Inleidinge* at least, it appears that Grotius did not devote any attention to policy considerations with respect to judicial liability. He observed and analysed the question through ‘dogmatic’ or, to be more precise, through natural law lenses as liability merely for breach of duty. Neither the ‘education argument’ nor, interestingly enough, the

³⁴¹ This was Huber’s view as to the practice outside Friesland.

³⁴² Except for Huber who held with respect to the law in force in Friesland that liability was for *dolus* and any *culpa*. However, Huber’s findings were based on a puristic application of Roman law and were, consequently, dogmatically quite distinct from Grotius’s approach.

'appeal argument' were recognised and discussed in his works. It is this lack of realism which is at the heart of the other writers' hesitation to accept Grotius's approach. This is particularly evident from the refusal of Van Leeuwen and Van der Keessel (who based at least some of their writings on the *Inleidinge*) to support Grotius's views.

Leaving aside the legal-political aspects, another important consequence of the course of development in Roman-Dutch law becomes apparent. Unlike the *prise à partie*, which appears to have been more of a means *sui generis*, Roman-Dutch law was based on the liability of the *iudex, qui litem suam fecit*. However, the uniformity of the category of quasi-delicts was shattered by the Roman-Dutch jurists' restriction of judicial liability, for the reasons stated above, to cases of *dolus* or at the most of *culpa lata*. This implied that the placing of judicial liability under the category of quasi-delict was completely without foundation since the *conditio sine qua non* of quasi-delictual liability was, as we know, liability for *imperitia*. Thus, while legal-political considerations resulted, on the one hand, in the clearing of dogmatic vagueness, they led, on the other, to a further weakening of the category of quasi-delicts.

5 JUDICIAL LIABILITY FOR INFRINGEMENT OF PERSONALITY RIGHTS

As has been indicated earlier, Roman-Dutch lawyers considered *animus iniuriandi* the essential aspect of liability under the *actio iniuriarum*.³⁴³ Intent was equated with *dolus* or *opzet*.³⁴⁴ Thus, *iniuria* had to be committed deliberately. Gross negligence (*culpa lata*) undoubtedly was not considered sufficient to give rise to liability.³⁴⁵ It could be said that a number of justification grounds or, in modern parlance, defences, were available to a defendant, but the defences allowed in Roman-Dutch law were by no means systematised as they are in modern South African law. In particular, no distinction was drawn between

³⁴³ Note again Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.1 *omne factum*.

³⁴⁴ Voet, *Commentarius*, 47.10.1; Van Leeuwen, *Censura Forensis*, 1.5.25.6; Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.1.pr; Huber, *Jurisprudence of my Time*, 6.8.2; Van der Linden, *Regtsgeleerd Handboek*, 1.16.4.

³⁴⁵ De Villiers, *Law of Injuries*, 27; Ranchod, *Foundations*, 75-79 and Walter, *Actio Iniuriarum*, 94-97 with further references.

defences directed against wrongfulness and defences directed against fault.³⁴⁶

5.1 Presumption of *animus iniuriandi*

Frequently, the question of whether a defendant was not only aware of the wrongfulness of his conduct but, in addition, acted with intent to injure became irrelevant. This is because Roman-Dutch law took over the concept, well established by the Glossators and Commentators, that in cases of a *prima facie* injury *animus iniuriandi* was simply presumed to have been present (*dolus praesumptus*).³⁴⁷ As has been shown earlier, this concept had its roots in the consideration that it was generally very difficult, and sometimes even impossible, for the plaintiff to prove the existence of *animus iniuriandi* on the part of the defendant.³⁴⁸ Thus, Kersteman states in his *Rechtsgeleert Woorden-Boek* that:

“De Atrociteit van Injurie moet Geestimeert worden of uit de plaats, of uit de tyd, of uit de perzoon, en andere omstandheden.”³⁴⁹

In a number of exceptional cases, however, despite the presence of a *prima facie* injury, there was no presumption of *animus iniuriandi*. Again, this is similar to the position of the Glossators and Commentators. The two most important categories of these exceptional cases were, firstly, where the injury resulted from the giving of professional advice or the performance of a professional service; and secondly, where the injury was caused by a person acting in a position of authority.³⁵⁰ Examples of the first category include the case of a doctor who wrongly diagnosed his patient as suffering from leprosy or the French pox; and the case of an exorcist or soothsayer who described a subject as a murderer.³⁵¹ Examples of the second case include: teachers, schoolmasters and parents chastising a pupil or child³⁵²; injurious

³⁴⁶ Besides Ranchod see Walter, *Actio Iniuriarum*, 98; Pauw, *Persoonlikheidskrenking*, 79; Davidtsz, *Animus Iniuriandi*, 195.

³⁴⁷ See Voet, *Commentarius*, 47.10.20; Van Leeuwen, *Censura Forensis*, 1.5.25.4; Strubberg, *Overijsselsch Advysboek*, 2.Cons.59.440.

³⁴⁸ For more details see Walter, *Actio Iniuriarum*, 96; Ranchod, *Foundations*, 75 and 77; De Villiers, *Law of Injuries*, 144 *et seq* and 193 *et seq*; Zimmermann, *Law of Obligations*, 1067-1068. See also above at chapter IV 2 text at fn124 *et seqq* and 4 text at fn229 *et seqq*.

³⁴⁹ See under ‘Injurie’

³⁵⁰ Schomaker, *Selecta Consilia et Responsa Juris*, vol.V Cons.63.10 and 11.

³⁵¹ Voet, *Commentary*, 47.10.20; Huber, *Heedendaegse Rechtsgeleerhey*, 2.3.8.5.

³⁵² Voet, *Commentary*, 47.10.20; Van Leeuwen, *Censura Forensis*, 1.5.25.1; Matthaeus, *De Criminibus*, 47.4.1.7; Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.1.

comments made by a priest in the course of a sermon³⁵³; a *fiscaal* (state attorney) who accused someone in court of a crime³⁵⁴ and, finally, of special importance for present purposes, a judge who injured someone before him by means of words or even acts.³⁵⁵

5.2 The effect on judicial liability of rejection of the presumption of *animus iniuriandi*

Undoubtedly judges in the Low Countries enjoyed a privileged status under the *actio iniuriarum* or, in other words, a presumption operated in favour of the members of the judiciary.³⁵⁶ Seen in the context of the course of development, this privileged status derived from the application of the principle we have encountered already in Roman law and in Italian *ius commune*:

*"Is qui jure publico utitur non videtur injuriae faciendae causa hoc facere: iuris enim executio non habet iniuriam."*³⁵⁷

Moreover, it makes sense that a judge should be protected while upholding the authority of the courts and ensuring that justice is administered efficiently. These considerations undoubtedly make it necessary to invest judges with powers that override the ordinary legitimate rights of a person. Judges are allowed, and to a certain degree obliged, to infringe the rights of others. It is obvious that this squares well with the overall tendency in Roman-Dutch law to exempt the judiciary from too wide a scope of liability.

However, as was the case with regard to wrong judgements in Roman-Dutch law, judicial privilege under the *actio iniuriarum* was not wholly unrestricted. It was subject to the correct exercise of the judicial power. Unfortunately, the Roman-Dutch jurists, like their predecessors, were not precise in defining the boundaries of judicial privilege. This is

³⁵³ Matthaeus, *De Criminibus*, 47.4.7.1; Schomaker, *Selecta Consilia et Responsa Juris*, pars.V Cons.63.11. See also De Villiers, *Law of Injuries*, 201.

³⁵⁴ Schomaker, *Selecta Consilia et Responsa Juris*, pars.V Cons.63.11

³⁵⁵ Voet, *Commentary*, 47.10.20; Huber, *Heedendaegse Rechtsgeleertheit*, 2.3.8.19; Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.1.

³⁵⁶ See above at 5.1. De Villiers, *Law of Injuries*, 35, 40 and 199; Walter, *Actio Iniuriarum*, 97; Ranchod, *Foundations*, 77.

³⁵⁷ D 47.10.13.1. Add to this D 47.10.32: "*Quod reipublicae venerandae causa, secundum bonos mores fit, etiamsi ad contumeliam alicujus pertinet, quia tamen non ea mente magistratus fecit ut iniuriam faciat, sed ad vindicatam majestatis publicae respiciat, actione injuriarum non tenetur.*"

particularly evident from the jurists' comments with regard to the liability of judges for defamation.

5 2 1 Defamation

Defamation is what most Roman-Dutch writers had in mind when discussing judicial liability under the *actio iniuriarum*. Understandably so, since in comparison with other instances of injury, defamation in court occurred relatively often. Many a person in court must have felt himself defamed by the judge's harsh comments or questions. Voet, for instance, refers to a judge who, while on the bench, took "...some rather forcible steps..." against persons who disobeyed his orders or acted disrespectfully. He further mentions the use of "...somewhat sharp words..." by a judge who took to task someone who was allegedly guilty of an offence. Voet leaves no doubt that in these cases the judge acted lawfully according to the duties of his office.³⁵⁸ Moreover, the judge was entitled to correct not only witnesses and litigants but also "...advocates of causes, attorneys and others like them if any offence has been committed by such persons."³⁵⁹ Huber refers to judges who lawfully have to "...constrain refractory persons...".³⁶⁰ Meanwhile, a judgement as a written document could also infringe personality rights. Since in those days no reasons were given for the judgement, it was the verdict as such rather than written comments justifying the verdict that could injure the reputation of the defendant or accused.³⁶¹

These examples indicate what judges were allowed to do without facing liability. There is no suggestion, however, of the criteria for determining when a judge was considered to have exceeded the limits of his judicial authority.³⁶² The only jurist who provides us with some information is Voet. In his commentary, at 47.10.2, he states:

³⁵⁸ Voet, *Commentary*, 47.10.20.2.

³⁵⁹ Voet, *Commentary*, 47.10.20.2.

³⁶⁰ *Jurisprudence of my Time*, 6.8.19.

³⁶¹ See Hahlo and Kahn, *Legal System*, 280 and 544. See also Dolezalek, *Stare Decisis*, 88 and particularly the in-depth treatment of the subject by Godding, *Jurisprudence et Motivation des Sentences*, 140-152.

³⁶² Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.1 refers merely to: "...wrongfully pronounces judgement..."; and Huber, *Jurisprudence of my Time*, 6.8.19 states that if the judge: "...has gone...too far in the...punishing of refractory persons, cannot lightly be sued for injury; but only when, confident in the power of his office, he misuses persons beyond the requirements of his actual duties."

“Anyone besides can wreak a wrong, not only when he is engaged on an entirely unlawful affair, but also when he is taken up with a thing that is lawful or with the carrying out of a duty entrusted to himself, so often as he insultingly oversteps the prescribed bounds of his duty, and misuses his power in contempt of another. It is open to the magistracy and to judges by lawful right and in the right of the office they uphold to chide and correct litigants, advocates of causes, attorneys and others like them, if any offence has been committed by such persons...Nevertheless it is in defiance of good morals if such persons have loaded someone with insulting words, or chastised him without reason or beyond the limit, not with a view of upholding the sovereignty of the people...but with a view to the stirring up of ill will and evil report...”.³⁶³

According to Voet, thus, a judge overstepped the boundaries of his duties whenever he acted with the purpose of stirring up ill will and evil report (*sed ad concitandam invidiam atque infamiam*). The presumption of *animus iniuriandi*, which generally did not apply to judges, applied in such cases. In other words, the judge was presumed to have been actuated by *animus iniuriandi*.³⁶⁴ An example of this kind of overstepping is that of Lambertus Goris: a judge who verbally abused the appellant in court because the appellant’s notice of appeal included the statement that the decision *a quo* was considered void.³⁶⁵

5 2 2 Wrongs against the body (torture)

One might well ask whether it is at all possible that a judge could injure another person’s body while acting in a judicial capacity. The few cases discussed in the Dutch legal literature include those where judges unlawfully and intentionally decreed that a person be tortured. Van der Keessel confirms the view that in such a case the *actio iniuriarum* could be instituted on the basis of *D* 47.10.32 as well as *D* 47.10.15.34 and 41. This action would have to be instituted along with another criminal action, namely an action under the *lex Cornelia de sicariis*. Van der Keessel’s doubts extend only as to whether the remedies would run cumulatively.³⁶⁶

However, Van der Keessel does not go as far as writers who would allow the *actio iniuriarum* even if a judge had ordered torture from ignorance and without intent. Van der Keessel makes

³⁶³ In quoting from Gane’s translation of Voet’s *Commentarius* I omitted the sub-titles as it has been – rightly – suggested by Joubert JA in *May v Udwin* 1981 SA (1) 1 (A) 16.

³⁶⁴ Voet, *Commentary*, 47.10.2. See also De Villiers, *Law of Injuries*, 39–40.

³⁶⁵ Goris, *Adversariorum Iuris Subcisorum*, 3.2.14.12 *et seq.* On Goris see also De Wet, *Ou Skrywers*, 141; Van Zyl, *Geskiedenis*, 378; De Vos, *Regsgeskiedenis*, 197–198.

³⁶⁶ See *Praelectiones ad Jus Criminale*, 48.18.13.

it plain that the *actio iniuriarum* requires intent for its application³⁶⁷, but he leaves a little window open in that if the judge is proved to have acted unlawfully a presumption of *dolus* or rather of *animus iniuriandi* would once again arise.³⁶⁸ Consequently, it may be said that in cases of torture the criterion for the determination of abuse of judicial authority was a wrongful (unlawful) misjudgement.³⁶⁹

5 2 3 Wrongs against personal liberty (false imprisonment)

Infliction of unlawful bodily restraint was also considered a wrong against personal liberty.

Within the judicial sphere, the most important example in this regard is undoubtedly false imprisonment. Somewhat surprisingly, the question of false imprisonment by a judge is scarcely ever discussed in the Roman-Dutch legal sources.³⁷⁰ The reason for this omission appears to be that in most such cases the *actio iniuriarum* was instituted against the officers of the court who performed the arrest rather than against the judge.³⁷¹ Nevertheless, in practically all cases it was the judge who would have ordered the arrest. Moreover, a judge could, as we have seen, be liable for ordering torture even though he did not administer it himself. Why should the same principle not apply to a judge for wrongful arrest? Some support for this view is to be found in *D 47.10.13.2* which, although dealing with lawful arrest, does not distinguish between judges and their officers.

Even if the works of the jurists assessed do not elaborate on cases of arrest ordered wrongfully by a judge, it appears that in practice this occurred not infrequently. In the year 1670, for instance, it is reported that two plaintiffs sued for wrongful arrest under the *actio iniuriarum* a local judge who, contrary to a mandate of the *Hoofdmannenkamer van Stad en Lande* of

³⁶⁷ *Ibid.* at 48.18.14.

³⁶⁸ His argument is C.9.35.5. For an interpretation of this passage see Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.6 *ad primo dissentientes*.

³⁶⁹ In Germany Art 20 of the *Peinliche Gerichtsordnung* of Charles V provided for civil liability of judges in cases of unlawful application of torture.

³⁷⁰ See for instance Voet, *Commentarius*, 47.10.7.1.11. He is referring more to malicious prosecution here. Further Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.2 *ad libertatem*.

³⁷¹ Voet, *Commentarius*, 48.3.6. On the officers of the court see also 5.1.60 and 62. De Villiers, *Law of Injury*, 40; Dolezalek, *Zivilprozessrecht*, 73.

Groningen, had continued to detain them for eighteen weeks. The *Hoofdmannenkamer* decided *inter alia* that a case of *contumacia* had to be approved, and granted an *amende honorable* (*vragen om vergiffenis met knieval*) as well as an *amende profitable*.³⁷² In 1700, a plaintiff unsuccessfully sued the judge from Baflo for *amende honorable* and *profitable* for wrongful arrest in a pub at three o'clock in the morning.³⁷³ Another example is a case reported in the *Hollandsche Consultatien*, where a former *schout* had been arrested wrongfully by the local college of *schepenen*.³⁷⁴ The *schout* sued the college of *schepenen* before the *Hof van Holland* for compensation for *iniuria* (*in cas van injurie*).

On the basis of these examples, it may reasonably be stated that a judge could be liable under the *actio iniuriarum* in Roman-Dutch law if he intentionally and unlawfully ordered a person's detention.

5.3 Damages

As far as the legal consequences of the *actio iniuriarum* are concerned, Roman-Dutch law was considerably different from Roman law, which focused merely on the payment of pecuniary damages. In the place of the Roman *actio iniuriarum aestimatoria*, Roman-Dutch law provided both the so-called *amende profitable* and the *amende honorable*. To both we have referred in the preceding paragraphs.

The *amende honorable* restored a plaintiff's honour. The *amende honorable* entailed three aspects, each with its own historical roots. First, there was the so-called *declaratio honoris*, which had its roots in Germanic law.³⁷⁵ The defendant would have to declare: "...that he considers the injured person a man of honour, against whose character he has nothing to say."³⁷⁶ Secondly, there was the *deprecatio*, which required the defendant to admit that he had

³⁷² Reported by De Blécourt in *TR* 14 (1935), 308-309 n252.

³⁷³ *Ibid.* at 313-315 n256.

³⁷⁴ See at 2.192.

³⁷⁵ Walter, *Actio Iniuriarum*, 107 and Zimmermann, *Law of Obligations*, 1072 with reference to von Wallenrodt, *ZfRG* 3 (1864), 243 *et seq.*

³⁷⁶ Van der Linden, *Regsgeleerd Handboek*, 1.16.4.1; Grotius, *Inleidinge* (1926), 3.36.3.

done wrong and therefore to beg the plaintiff for forgiveness.³⁷⁷ The *deprecatio* is a good example of the influence which canon law and Christian doctrines had on the *actio iniuriarum*.³⁷⁸ We are bound to forgive others just as God forgives us our sins. However, an offender must first ask for forgiveness.³⁷⁹ If some kind of additional humiliation was imposed, as in the case of the *schout* referred to above (where the judge was obliged to pray on his knees for *deprecatio*) this obviously was more than welcome.³⁸⁰

The third and most important aspect of the *amende honorable* was recantation (*palinodia* or *revocatio*).³⁸¹ The defendant was obliged to retract his words and declare that what he had said was untrue. The aim was to restore the victim's honour. Like the *deprecatio*, the *actio ad palinodiam* had its roots in canon law.³⁸² As Ranchod states, it is likely that Grotius, who was one of the first Roman-Dutch authors to make use of the *amende honorable*, once more was inspired by Domenicus Soto who, in turn, reviewed the law of compensation as it was passed on by the canonists and moral theologians of the Middle Ages.³⁸³

The *amende profitable*, on the other hand, is similar to the Roman *actio iniuriarum aestimatoria*.³⁸⁴ This is evident from the fact that the plaintiff had to specify his own damages. However, the court was not bound to award this amount. Van Leeuwen states: "The penalty...is discretionary, prescribed by considerations of place, time and quality of person."³⁸⁵ A plaintiff had to be careful not to ask for too much since this could in turn lead to an *actio iniuriarum* being instituted by the other party.³⁸⁶ Consequently, a judge sued for pecuniary

³⁷⁷ See Voet, *Commentarius*, 47.10.17; Grotius, *Inleidinge* (1926), 3.35.2; Van Leeuwen, *Rooms-Hollands Regt*, 4.37.1.

³⁷⁸ See for further examples Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.8 *ad quamquam Christianum*.

³⁷⁹ See Zimmermann, *Law of Obligations*, 1072. See also De Villiers, *Law of Injury*, 177-178.

³⁸⁰ See Ranchod, *Foundations*, 90 for more details. De Villiers, *Law of Injuries*, 178. An example that *deprecatio* was also in practice in the Dutch Cape colonial settlement is evident from Leibrandt, *Requesten*, 317: "...the burgher, Hendrik Hermanus Bos...after the trial had been sentenced...on bare knees, to pray to God and Justice for forgiveness...".

³⁸¹ See Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.12 *ad ceterum* and *Praelectiones Iuris Hodierni*, 3.36.3; Van Leeuwen, *Censura Forensis*, 1.5.25.8; Voet, *Commentarius*, 47.10.17; Grotius, *Inleidinge* (1926), 3.35.2; Groenewegen, *Tractatus*, Inst.4.4.10.1.

³⁸² Burchell, *Law of Defamation*, 11; De Villiers, *Law of Injuries*, 177.

³⁸³ See his *Foundations*, 65 with further references. See also Zimmermann, *Law of Obligations*, 1072 particularly fn 176.

³⁸⁴ Professor Feenstra as quoted by Ranchod, *Foundations*, 66-67, on the other hand, makes the point that it may also have originated in Germanic customary law. See also Walter, *Actio Iniuriarum*, 104-105; Zimmermann, *Law of Obligations*, 1070-1071; Burchell, *Law of Defamation*, 11-12.

³⁸⁵ *Censura Forensis*, 1.5.25.8

³⁸⁶ Strubberg, *Overijsselsch Advysboek*, 2.Cons.59.441.

damages had to pay a sum initially estimated by his opponent but assessed by the (second) judge.

Controversy arose over the question of whether *amende honorable* and *amende profitable* could be cumulative. According to the general rules, this was at issue only where both *amendes* were granted to remedy a crime. Cumulation was out of the question if it led to a double penal sentence.³⁸⁷ In this case, a regime of elective concurrence applied.³⁸⁸ The *amende profitable* was undoubtedly classified as a penal action. The answer, thus, depended on whether the *amende honorable* was chiefly reipersecutory or not. The majority of Roman-Dutch lawyers favoured the view that the *amende honorable* was merely reipersecutory since it was aimed primarily at restoration of the honour of the victim.³⁸⁹ The prescription period was one year.³⁹⁰

5 4 Conclusions

In Roman-Dutch law, a judge could be held liable under the *actio iniuriarum* for infringing the personality rights of a party to a case. However, as in cases of liability for wrong judgements, it was not common for a judge to be sued for damages. Judges were privileged in the sense that judicial acts, even if *prima facie* injurious, were generally presumed not to have been committed with *animus iniuriandi*. The reason for this privileged status, once again, is to be found in considerations of legal policy: for the sake of efficiency, credibility and the authority of the courts. Judges were permitted, indeed were to a certain degree obliged, to interfere with other persons' personality rights.

³⁸⁷ Coing, *Europäisches Privatrecht*, 515; Zimmermann, *Law of Obligations*, 1073; De Villiers, *Law of Injury*, 179.

³⁸⁸ Zimmermann, *Law of Obligations*, 1073.

³⁸⁹ De Villiers, *Law of Injury*, 179; Ranchod, *Foundations*, 66. Walter, *Actio Iniuriarum*, 107 remarks that another view also prevailed, namely that the somewhat humiliating consequences of the *amende honorable* were interpreted as penal rather than simply reipersecutory. He refers to Matthaeus, *De Criminibus*, 47.4.4.1. To this may be added Voet's statement in his *Commentary* at 47.10.17 that the *actio ad palinodiam* in itself carried a considerable degree of punishment. That this opinion did indeed have some proponents in Roman-Dutch law is further evident from Zimmermann, *Law of Obligations*, 1074.

³⁹⁰ Grotius, *Inleidinge* (1926), 3.35.3; Huber, *Heedendaegse Rechtsgeleertheyt*, 2.3.10.14; Vinnius, *Ad Institutionum*, 4.4.12.5; Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.19 and *Praelectiones Iuris Hodierni*, 3.35.3; Matthaeus, *De Criminibus*, 47.4.1.17.

This view, which had already been adopted in Roman law and by the Glossators and Commentators, is consistent with the general tendency in Roman-Dutch law to exempt members of the judiciary from liability. However, this privileged status was limited by a requirement of reasonable and lawful exercise of the assigned duties and inherent obligations of the specific judicial office. Unfortunately, Roman-Dutch jurists were not very precise in defining the exact limits of abuse of authority.

6 CONCURRENCE AND CUMULATION OF ACTIONS

It is clear from what has been said so far that parties had various remedies for infringements of their rights by the judiciary. What remains to be considered is the relationship between these actions. In other words, was there any concurrence of actions and could they be cumulative?

Since the *actio legis Aquiliae* and the *actio de dolo* had become merely reipersecutory in Roman-Dutch law, it was widely accepted that these actions could run together. Concurrence of actions, therefore, was only relevant for criminal actions, that is with regard to the *actio iniuriarum* and other penal actions under such *leges* as the *lex Cornelia de sicariis*, the *Lex Cornelia de falsis* or the *Lex Julia repetundarum*. Suffice it to say that these criminal actions stood in elective concurrence to each other.³⁹¹

A second aspect is that of cumulation. Roman-Dutch law allowed the cumulation of distinct actions.³⁹² Cumulation is an aspect of procedural law according to which a plaintiff may concurrently institute different actions in the same legal suit. Since Roman law did not have any clearly worked out system of cumulation, this was a novel concept. Its origins appear to have been in canon law, where it was developed to prevent delays in the administration of justice that resulted from increased numbers of separate actions related to the same incident.

Obviously, actions which had the same content, which were directed at the same remedy and which originated from the same cause of action, could not be cumulative. However,

³⁹¹ Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.16 and 48.18.13.

³⁹² For more details see Van Aswegen, *Sameloop*, 62 *et seq.*

cumulation was possible in a case where one injurious act, that is the cause of action, led to two different actions. This is the case Voet had in mind when he stated:

“According to our present day usage...a person that suffered an injury has no other...remedy...than the action for honourable and profitable amends, except that, if such injury happens also to have occasioned him any patrimonial loss, he has a private suit for indemnification under the *Lex Aquilia*.”³⁹³

Van Leeuwen and Van der Keessel agreed with this view.³⁹⁴

7 PROCEDURAL ASPECTS OF JUDICIAL LIABILITY

In an earlier chapter it was said that in classical Roman law a distinction was drawn between magistrates and ordinary *iudices*. Only the former enjoyed a privilege in that, during their term of office, they could not be summoned to court except for offences committed during their period of office and relating to it.³⁹⁵ In all other cases, litigants were obliged to wait until the end of the period of office of the official. Judges, generally, were not exempt from summons to court, except for periods when they were hearing a case. Magisterial privilege seems to have been based on the same ideas as the so-called *venia agendi*, which had to be obtained by minors or wives in order to sue their parents or spouses. Both rules were intended simply to prevent vexatious or unreasonable actions which could result in possible loss of reputation or loss of efficiency. Later, in the days of the empire, imperial officers performed both magisterial and judicial functions and the magistrates' privilege, thus, applied to any action brought in respect of a judicial wrong.

The *rechters* in the Low Countries were public officers. Administration of justice was administration in the name of the *Overigheid*. In his *Manier van Procederen*, Merula refers to *public personen* who are in the service of the provinces and the cities.³⁹⁶ Dutch judges found themselves, thus, on the same level as any other state official.³⁹⁷ Hence, it is worth asking whether Roman-Dutch judges enjoyed any procedural privilege.

³⁹³ *Commentarius*, 47.10.18 as translated by De Villiers in his *Law of Injury*, 181.

³⁹⁴ *Rooms-Hollands Regt*, 5.15.9 and *Praelectiones ad Jus Criminale*, 47.10.16 further at 48.18.13 and 14.

³⁹⁵ D 2.4.2. See above chapter II 4.

³⁹⁶ At 4.24.12.1. and note also Groenewegen, *Treatise*, C.3.1.5. Further Huussen, *Bijdragen* 93 (1978), 242.

³⁹⁷ Sceptical is Vries, *TVG* 90 (1977), 335-336.

The Roman-Dutch authorities were of the unanimous opinion that magistrates of all grades could be summoned to court.³⁹⁸ No privilege as regards summons prevailed in the Low Countries for the judiciary. Voet confirms this view and states that he could see no reason to differentiate between private persons and dignitaries or officers of the state. He denied the latter any privilege simply on the basis of the dignity of their office.³⁹⁹ This view was also adopted by Vinnius in his commentary.⁴⁰⁰ Undoubtedly, he included all judicial officers, from the highest judges of the *Hoge Raad* to the simple *baljuw* or *schepenen*.⁴⁰¹ Roman law had clearly been abrogated. As Merula stated, summons of all *publyke personen* clearly was “...*contra* [the Roman] *Edictum Praetoris*.”⁴⁰²

That no procedural privilege prevailed in Roman-Dutch law is further evident from Art 8 of the Instruction of the Court of Holland, according to which this court had first instance jurisdiction in all criminal and disciplinary actions against officials; and, more particularly, Art 12, which gave the Court jurisdiction over any *Baljuws*, *Schepenen* or other high official for faulty decisions, carelessness and favours.⁴⁰³ It appears however that some technical peculiarities might have existed in Roman-Dutch law with regard to the form of summons of judges. It is argued here that in cases which “...*betreft haaren* [the judges’] *dienst en Officie*...”, judges, like any other *publyke persoon*, were supposed to be summoned in a manner different from when a judge was sued in his personal or private capacity – regardless of the fact that, if the judge lost the case, he was held personally liable.⁴⁰⁴ According to Art 38 of the Instruction of the *Hof van Holland*, an official who was sued in his official capacity had

³⁹⁸ Voet, *Commentary*, 2.4.5; Groenewegen, *Treatise*, D.2.4.1 and C.1.53.1.4; Merula, *Manier van Procederen*, 4.24.12.1.

³⁹⁹ *Commentary*, 2.4.5: “...no magistrate, any more than any private person, is prevented by the honour of his magistracy, whether temporary or lifelong, and however high it be, from being summoned to law.”

⁴⁰⁰ Vinnius, *Ad Institutionum*, 4.6.12.5 pr.

⁴⁰¹ For more details see again at 2.1 and 2.2.

⁴⁰² *Manier van Procederen*, 4.24.12.1.

⁴⁰³ *Instructien van den Hove van Hollandt, Zeelandt ende Vrieslandt geordonneert by de Keyserlijke Majest. 1531*. See Van der Linden, *Judicieele Practijcq*, 2.1.9. According to Art 7 of the Instructions, the Governor and with him the President and the Councillors of the Court were entitled to correct and suspend the *Baljuwen* or other officers for any delict.

⁴⁰⁴ Merula, *Manier van Procederen*, 4.24.12.1; Voet, *Commentary*, 2.4.5; Groenewegen, *Treatise*, D.2.4.2.2. Further De Schepper, *Gerichtliche Kontrolle*, 59-61. The argument is that because state liability did not exist in the Republic of the Netherlands it can be concluded *e contrario* that the liability of all *publyke personen* was personal. Consequently, there is no reason to believe that in the case of actions against judges, summons were not the same as in the case of other *publyke personen*.

to be summoned by means of so-called *besloten brieven*, instead of the usual open writ.⁴⁰⁵ A sealed letter was delivered in which the official was kindly requested to appear on a certain day in court.⁴⁰⁶ Further differences are evident from the fact that officials who had been summoned were addressed not as *Gedagvaarder* but as the somewhat better *Beschrevenen*.⁴⁰⁷

At first sight, thus, one can detect hardly any difference between the situation in the Netherlands and the law of the Italian city states. However, in the Italian city states the motivation for the rejection of procedural privilege was entirely different. As discussed earlier, in Italy unrestricted summons of judicial officers was absolutely essential for the enforcement of syndication, a practice that at no point applied in the Netherlands. On the contrary, it appears, at least from the comments of Voet, as if some notion of equality before the law might have been the underlying reason for Dutch jurists to hold the view that the procedurally privileged status of judges was misplaced.

But lofty theory is often not reflected in practice. From the historians we learn that different practice did prevail in everyday Dutch city life where it certainly caused quite a scandal when a burgher tried to sue a member of a local regent-patriciate family.⁴⁰⁸ This was not much different from the situation in the post-classical Roman empire. At the same time, it once again exemplifies the contrast with the conditions in Italy during the thirteenth to the fifteenth centuries. As may be remembered, near the end of the term of office of the *podestà* and his judges, burghers of all ranks were urged by messengers to come forward with their claims.

To return to the situation in the Netherlands, we must recognise the deep-rooted psychological hurdle for a prospective litigant, which proved an effective substitute for any formal procedural privilege. Professor Van Deursen quotes the seventeenth century priest Becius as saying that the judgement of God will not be like the earthly courts which were "...but spiders' webs, which great flies that sting most fiercely can fly through, while the small mosquitoes

⁴⁰⁵ Further Van der Linden, *Judicieele Practijcq*, 2.1.12.

⁴⁰⁶ *Ibid.* at 2.1.8.

⁴⁰⁷ *Ibid.* at 2.1.14.

⁴⁰⁸ Van Deursen, *Het Koppergeld*, 166-168; Lademacher, *Niederlande*, 210: "Aber wie die Forderungen, den Privilegien Geltung zu verschaffen, vergeblich blieben, so wurde auch offiziell vorgetragenen Kritik an oder Anzeige gegen hohe Amtspersonen abschlägig beschieden; eine solche Anzeige kam gar nicht erst zur Behandlung."

stick fast.”⁴⁰⁹ The tendency of the ruling regent-patriciate to protect themselves as members of a class was not a mere chimera but common practice in the seventeenth and eighteenth centuries.

This observation is reinforced by accounts of the regent leaders of the Dutch colonial societies overseas. For instance in Batavia (today Djakarta) in Indonesia or at the Cape, notwithstanding the psychological barriers to actions against judges, written rules with regard to procedural privilege for all members of the *Overigheid*, including of course the judiciary, were eagerly legislated, owing possibly to the enormous distance from the motherland. It is a fascinating detail of legal history that these local abrogations at the Cape to some extent still have relevance in modern South African law.

⁴⁰⁹ Van Deursen, *Het Koppergeld*, 167.

“... [each judge should be able to] do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: ‘If I do this, shall I be liable in damages?’”

(Lord Denning)¹

VI ENGLISH LAW

1 THE POSITION AND STATUS OF JUDGES WITHIN THE ENGLISH ADMINISTRATION OF JUSTICE

1 1 Historical development

Like most medieval states in Europe, England in the tenth century was divided into feudal and local units. A feudal unit was a manor, usually headed by a feudal lord who, in turn, was subject to a higher lord; the latter, in turn, was subject to the king. The structure of local units was more complex, being divided into so-called vills (villages) and shires (counties) as well as boroughs (cities). The inhabitants of a vill were subject to the so-called hundreds, local folk courts which under the authority of a hundredman assembled once about a month from about the tenth century onwards. The largest borough of a shire became the seat of a royal provincial commander, the so-called ealdorman. Twice a year, a shire assembly, the shire moot, met under the leadership of the local ealdorman to deal with more significant matters of communal justice. Such moots were found in the various boroughs of the shire.

At the manors, generally, the feudal lords were engaged in the jurisdiction of so-called manor courts. The lords themselves were subject to their superior lord’s seigniorial court. All these early courts were not staffed by professional jurists or lawyers. Hundredmen, ealdormen or other ‘judges’ were laymen who administered justice according to local customs. Further, it is inaccurate to refer to these bodies as courts since purely administrative and judicial tasks were hardly kept apart. Apparently the Anglo-Saxon kings tried to retain some control of the local

¹ In *Sirros v Moore* [1974] 3 WLR 459 at 470.

moots by either depriving the feudal lords subordinate to them of their jurisdiction in cases of abuse or by vesting so-called shire-reeves or sheriffs with power of control in respect of the shires. Finally, the kings themselves dealt with legal matters when unsatisfied litigants turned to the Crown for assistance.² It can therefore be said that by the time of the Norman conquest: "...the constitutional notion that justice is a prerogative of the Crown was beginning to have some foundation in fact, though it was not yet expressed in words."³

During the first two hundred years of Norman rule, the rudimentary court of the Anglo-Saxon kings grew to a more powerful administrative and judicial instrument in the hands of the kings. Chancery and the Exchequer emerged as important agencies of royal administration and, by the late twelfth century, Henry II established a central royal court called 'the Bench' to sit continuously (*in banco residentes*) at Westminster.⁴ This was quite a large departure from the common practice of itinerant royal judges who toured the realm on an *ad hoc* basis (justices in eyre).⁵

What has been said in the previous chapter with regard to the emergence of the central courts in France and the Netherlands to a large extent also applies to England, albeit at a remarkably early stage.⁶ The emergence of royal courts from the *curia regis*, the kings' general advisory council, as well as their growing professionalisation, especially with regard to the increasing technicalities of the developing common law, combined with permanent settlement at Westminster, are considered the main reasons for the emergence of the three earliest common law courts, namely the Exchequer, the Court of Common Pleas and the King's Bench. Even though the kings continued to judge in person as they travelled, the task of judging before the king was generally allocated to justices in eyre who now toured the country in six circuits, as well as to the permanent courts at Westminster.⁷ These royal judges had civil as well as criminal jurisdiction. All cases brought under a royal writ were heard as long as they met a

² For the early Anglo-Saxon period see *inter alia* Brand, *Formation*, 1; Pollock and Maitland, *History*, 37-38 and 42; Lyon, *Gericht*, 1324.

³ Baker, *Introduction*, 9.

⁴ For the following see Blackstone, *Commentaries*, vol.III 37-50; Plucknett, *History*, 146-150; Baker, *Introduction*, 16-17; Berman, *Law and Revolution*, 440-445; Holdsworth, *History*, vol. II 174-176, vol.I 22-63; Turner, *Judges*, 17-33; Brand, *Formation*, 105-110; Lyon, *Gericht*, 1325.

⁵ Plucknett, *History*, 144 states that the English justices in eyre resembled to some extent the Carolingian *missi domenic*.

⁶ A theme which is stressed by Berman, *Law and Revolution*, 442-443.

⁷ Brand, *Formation*, 111-114.

certain jurisdictional limit (40 shillings). By the early fourteenth century, the King's Bench restricted its jurisdiction to criminal cases as well as to felonies, actions of trespass, suits to correct errors in the Court of Common Pleas and boroughs' courts of record and pleas that affected the king himself, while all other civil matters – common pleas – were dealt with by the Court of Common Pleas. The Court of Exchequer retained jurisdiction in fiscal matters.

Yet another important court emerged from the kings' Chancery, the body that co-ordinated the kings' administrative tasks. This duty implied the chancellors' right to issue orders in the name of the king. In other words, Chancery had the power of the royal seal. The origins of the Court of Chancery are twofold. On the one hand – its so-called Latin side – Chancery was engaged in questions of the feudal rights of the crown, which generally entailed matters regarding land. Records of proceedings of this kind were kept in Latin. On the other (English) side, Chancery served to mitigate the harshness and rigidity of literal interpretations of the common law: the Court of Chancery gave relief where a process before one of the common law courts was simply not available, where litigation before a common law court had been fraudulent, and in cases concerning forgery and duress.

Essentially, therefore, Chancery's jurisdiction was an equity jurisdiction which was based on the traditional notion of last resort, namely petitioning the king for redress. Soon the kings referred petitions of right directly to Chancery and it was the chancellors who granted relief in their own court – the Court of Chancery – as they thought 'fit in equity and good conscience'. For all practical purposes, the most notable difference from the ordinary common law courts, besides jurisdiction, was the Court's procedure which at the outset provided for speed and simplicity. Unlike the procedure at the common law courts which was characterised by deep-rooted formalism, no formal writ was necessary and actions began with an informal bill or complaint, generally in English since all legal business was performed and all records were kept in English.⁸

By the end of the sixteenth century, the twofold structure of courts of common law and equity had been supplemented⁹ by courts commonly referred to as conciliar courts or prerogative courts since they grew largely out of the kings' efforts to reassert royal authority after the

⁸ Veall, *Law Reform 1640-1660*, 32-33; Baker, *Introduction*, 84-89; Plucknett, *History*, 163-165.

⁹ For the following see Holmes, *Legal Instruments*, 279-281; Baker, *Introduction*, 101-106.

political breakdowns of the fifteenth century. The king's private council, the Privy Council, met at the so-called Star Chamber when it exercised jurisdiction. The Star Chamber's jurisdiction included jurisdiction over the corruption of justice in local courts as well as over offences such as libel, riot and unlawful assembly, which once again were not fully actionable before the common law courts. In addition, there emerged the Court of Requests which gave relief when poverty kept parties from pursuing their claims before the common law courts.

The early Tudor kings also established a set of new provincial courts, namely the Councils of the North, the Marshes and the West, areas which were distant from Westminster and were notorious for disorder. These courts exercised a supervisory jurisdiction modelled on the jurisdiction of Star Chamber, supplemented by a localised competence in civil and criminal matters. The procedures of all these prerogative courts were similar to those of the Court of Chancery and were favourably received by litigants.

In due course, common law judges responded to the challenges of the prerogative courts. Initially, they revised the procedures of the common law courts to counter the advantages of the prerogative courts.¹⁰ After they had succeeded in this, they developed a more aggressive attitude against the 'intrusions' of the conciliar courts. The chief protagonists of this conflict were Sir Edward Coke, subsequently Chief Justice of the Court of Common Pleas and the King's Bench, and Lord Ellesmere, who was Chancellor from 1596-1617. Ellesmere, like his one time predecessor Cardinal Wolsey, encouraged actions in Chancery after the common law courts had given judgement. In consequence, a backlog of thousands of cases hampered the proper administration of justice. Coke responded to this threat by exalting the common law on the basis of its immemorial antiquity and, thus, the superiority of those courts that dealt with it. Consequently, Coke argued, judgements of common law courts were always binding on all other courts.

The emergence of the conciliar courts and their considerable strength by the early seventeenth century has to be seen not merely in the light of obnoxious jurisdictional rivalries. They were harbingers of the greater conflict that overcame England during the seventeenth century, the conflict between the kings, who were increasingly pressing for absolutism including the king's

¹⁰ For more details on the relationship between Chancery and common law courts in the seventeenth century see Baker, *Introduction*, 89-93 and his *Common Lawyers*, 205-229; Holmes, *Legal Instruments*, 280-285; Kiralfy, *Historical Introduction*, 152-160.

legal supremacy, and Parliament and the common law courts, who favoured restriction of royal authority. The latter considered the kings' practice of creating new prerogative courts an unwarranted limitation of the jurisdiction of the common law courts and an ill-considered exercise of royal power.

Initially, Coke's views did not succeed and James I accepted the argument of his Chancellor, Lord Ellesmere, which for obvious reasons, was the more appealing. Ellesmere considered the king as the fountain of justice and thus affirmed his power to establish new courts as well as to assign to or to take away from certain courts specific jurisdictions. James I's successor, Charles I, attempted to further extend royal legal authority, but his experiment collapsed in 1640. Parliament had to be assembled and all prerogative courts except Chancery were abolished. The decline of monarchy from the middle of the seventeenth century provided the space which Parliament eagerly filled and, by the second half of the eighteenth century, the famous Westminster system had appeared and made Parliament the true sovereign of England and later of Great Britain, to which the kings and the courts, in the end, had to yield.¹¹

With the retention of the Court of Chancery, however, one evil continued: the constant overlapping of jurisdictions of the superior courts as well as the notorious lack of judicial manpower in Chancery, where practically all the legal business was still performed by the Chancellor personally assisted by the Master of the Rolls.¹² These problems produced a great deal of delay as well as confusion.

By the nineteenth century, lawyers accepted the pressing need for reform. By 1854, three vice-chancellors sat as single judges with the Master of the Rolls, and a Court of Appeal in Chancery was established, staffed by the Master of the Rolls and two additional Lords Justices. A further cure was provided by empowering Chancery to hear questions of law and not only of equity, to try issues of fact by jury and to award damages. In turn, courts of common law were assigned the right to grant injunctions and to hear equitable defences. In other words, the typical business of courts of equity and courts of law were assimilated.¹³ The

¹¹ It will become apparent in the following chapter that it was this specific subordination of the judiciary within the Westminster system that is considered one of the prime miscreants in the failure of South Africa's judiciary to take a firm stand against the National Party government's onslaught against human rights. For details see below at chapter VII 1 2 2 1

¹² Manchester, *Modern Legal History*, 136-138; Plucknett, *History*, 209-210.

¹³ Baker, *Introduction*, 97-99; Manchester, *Modern Legal History*, 125-128.

Judicature Acts of 1873 and 1875 saw the abolition of the division between Chancery and the common law courts. All became divisions of a new High Court of Justice (consisting of Queen's Bench, Common Pleas, Exchequer, Chancery, Probate, Divorce and Admiralty) added to by a court of appellate jurisdiction and the House of Lords.¹⁴

The Supreme Court Act of 1981 and the Courts Act of 1971 as amended are the most recent reforms.¹⁵ Appellate jurisdiction nowadays is performed by the House of Lords sitting with nine Lords of Appeal in Ordinary and the Court of Appeal staffed by 29 Lord Justices of Appeal. The Court of Appeal is divided into civil and criminal divisions. The Probate, Divorce and Admiralty divisions were fused in the so-called Family Division, the High Court now consisting merely of three divisions staffed by 84 judges. A Crown Court was set up as mediatory (superior) criminal court between the Court of Appeal and the inferior courts, namely the magistrates' courts. The country is divided into circuits, and circuit administrators with a permanent staff make arrangements for sittings of the Crown Court under the general direction of a High Court judge. The Crown Court has three kinds of judges, High Court judges, Circuit judges (full-time judges) and Recorders (part-time judges) who sit depending on the gravity of the offence involved.

On a local level, at least in theory, the hundreds and other local courts continued to function until 1867, when their civil jurisdiction was abolished.¹⁶ However, as early as from the Norman conquest, about half of the hundreds had been taken over by local lords and were converted into manorial courts. From about the fifteenth century until 1846 there existed no national system of civil courts for minor cases. But in that year the County Courts Act of 1846 introduced a system of county courts that to some extent still is in operation today. For all practical purposes today England and Wales are divided into districts and judges' circuits. These courts nowadays are staffed by Circuit judges who, as has been seen, may also sit in the Crown Court, as well as by Recorders.

¹⁴ The first three divisions were merged into the Queen's Bench Division as early as 1881. For details on the nineteenth century law reforms see Plucknett, *History*, 211-212; Manchester, *Modern Legal History*, 147-149; Baker, *Introduction*, 98-99; Kiralfy, *Historical Introduction*, 232-235; Blumenwitz, *Einführung*, 11-12 and 24-26.

¹⁵ For details see James, *Introduction*, 35-44 and Shetreet, *Judges on Trial*, 19-28.

¹⁶ Manchester, *Modern Legal History*, 124.

Historically, another rival of the traditional local courts emerged in the Justice of the Peace, at least with regard to criminal jurisdiction.¹⁷ The office of the Justice of the Peace derived from the common practice of appointing local knights as keepers of the peace who were supposed to co-operate with the local sheriffs. Initially, therefore, the keepers' prime tasks were of administrative rather than judicial provenance. However, for various reasons, the keepers' power to hold prisoners and deliver them to other officials was enlarged to the right to try prisoners.

From 1368 onwards, Justices of the Peace, as they came to be called, became responsible for most criminal business on the local level, largely at the expense of the ancient local courts from which they increasingly drew jurisdictions. The underlying reasons for this development are somewhat hazy. However, there is some strength in the argument that the Justices of the Peace were closely monitored by the kings' council. Taking this into account it is fair to say that the Justices of the Peace "...became not merely the local representatives of the royal jurisdiction, but also to a large extent the administrative and political agents of the King and Council."¹⁸ From the time of the Black Death Justices of the Peace were given the right to enforce laws governing labour relations.¹⁹ Subsequently, there were innumerable administrative duties added, such as the upkeep of highways, rates, licensing and administration of the poor law. When, in 1641, the Star Chamber was abolished and thus general supervision of the Justices of the Peace faded into non-existence, the great age of the Justices on local level began.²⁰ For all practical purposes, they were the little kings of the countryside until the days of the industrial revolution, when local authorities took over many of the Justices' duties.

In criminal matters, until 1971, six Justices and one Justice of Assize administered the law in so-called courts of quarter sessions which held court four times a year in every county. From the sixteenth century, it was also provided for two Justices to sit and inflict summarily (without a jury) small penalties for petty offences. Finally, from 1554, Justices of the Peace

¹⁷ Generally with regard to the Justices of the Peace see Plucknett, *History*, 167-169; Carter, *History of English Legal Institutions*, 194-195; James, *Introduction*, 46-49; Manchester, *Modern Legal History*, 111-124 (inferior civil courts) and 160-164 (inferior criminal courts); Brand, *Formation*, 114.

¹⁸ Plucknett, *History*, 169.

¹⁹ Brand, *Formation*, 114.

²⁰ Carter, *History of English Legal Institutions*, 195; Holmes, *Legal Instruments*, 274-275.

were empowered to conduct preliminary examinations of people charged with indictable offences to determine whether there was a strong enough *prima facie* case for trial before a court of quarter session, the Royal Justices of Assize (itinerant judges) or even the King's Bench, the country's highest court of criminal jurisdiction until 1845. According to the Justices of the Peace Act of 1979, Justices or Magistrates, as they are also referred to, continue to enjoy summary jurisdiction and the right of preliminary examinations. They, further, have limited civil jurisdiction and they can hear claims by parents under the Guardianship of Minors Act of 1971. In urban areas, Magistrates are full-time paid Stipendiary Magistrates. Stipendiary Magistrates are not laymen as are ordinary Magistrates, but solicitors or barristers of a certain standing. Generally Magistrates are assisted by a clerk, usually a solicitor by training. Magistrates try about 98 % of all criminal proceedings.²¹

For centuries, from the days of the Reformation until 1845, there existed no national system of inferior courts of civil jurisdiction. Owing to antiquated procedure, litigants soon began to consider local courts as inadequate to cope with the growing technicalities of the law. Practically no appeals could be made from the local courts, and judgements could not be enforced against defendants who removed themselves or their property outside the boundaries of the respective court. Consequently, litigants rarely used the local courts and turned to the superior courts, which resulted in huge backlogs. This was aggravated by the fact that the traditional limitation of general jurisdiction of the local courts at 40 shillings, which once was considered a considerable amount, was made increasingly trivial by inflation. Furthermore, litigants could remove actions from the local courts to a superior court without giving security.²²

The County Court Act of 1845, however, provided for a system of civil inferior courts which is still in effect. The Courts Act of 1971 replaced the county court judges by circuit judges, who can also sit in the Crown Court. For the purpose of the county court system, the country has been divided into judges' circuits to ensure that local courts are easily available to litigants. County Courts have a wide civil jurisdiction in most actions in contract, tort or

²¹ Shetreet, *Judges on Trial*, 22 and 26.

²² Manchester, *Modern Legal History*, 112-114; Holmes, *Legal Instruments*, 271-273; Plucknett, *History*, 208-209; Veall, *Law Reform 1640-1660*, 37-39.

money recoverable by statute, recovery of land and equity. Over and above, various statutes to date have conferred further duties on the county courts.²³

1 2 Institutional aspects

1 2 1 Independence of the judiciary

It has been said that in medieval days no clear distinction existed between the executive, legislative and judicial functions of the state.²⁴ The judges were considered servants of the kings. Bacon is said to have described judges as lions, "...but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty."²⁵ Nonetheless, from about the fourteenth century, the idea emerges that judges' personal loyalty to the king was more an impersonal loyalty to the crown. From as early as the fifteenth century, there were a number of Chief Justices who took a firm stand against the king. Chief Justice Huse, for instance, resisted Henry V's desire to give preliminary opinions in a treason case with the words: "...[the case] would come before the King's Bench judicially, and then they would do what by right they ought to do."²⁶

The first quarter of the seventeenth century saw parts of the judiciary involved in a furious fight with the king, at this time James I, inclined as he was to lead England's monarchy on an absolutist path. The clashes of Coke and Ellesmere on the issue of the jurisdiction of Chancery and other prerogative courts were matched by Coke's head-on collision with the Crown in 1616 when common law judges of the King's Bench were brought before James I and asked whether the king had the right to interfere with pending cases. Once again it was Coke who responded to that threat with the words resembling those of Huse: "...when that case should be, he would do that should be fit for a judge to do." A few months later Coke was dismissed without reason by the king.²⁷

²³ James, *Introduction*, 44-46.

²⁴ For the following see Shetreet, *Judges on Trial*, 2-15; Holmes, *Legal Instruments*, 280-284; Baker, *Introduction*, 143-146 and *Common Lawyers*, 205-229; Plucknett, *History*, 231-251.

²⁵ Bacon, *Essays*, 510.

²⁶ Quoted at Baker, *Introduction*, 144-145.

²⁷ Baker, *Introduction*, 144; Lerch, *Coke*, 132; White, *Sir Edward Coke*, 7; Shetreet, *Judges on Trial*, 4.

This opened the door to radical changes. In the following decades, James I, Charles I, James II and Charles II did not necessarily feel restrained in appointing and dismissing judges at their discretion. By the late 1630s, Charles I had assembled a compliant bench which became an instrument of prerogative rule with judges' acceptance and application of the 'doctrine of necessity' whereby, in cases involving the safety and the well-being of the kingdom, the king was allowed to abrogate the rules and procedure of the courts. Even though things improved during the revolution, Charles II again engaged in the practice of forcible retiring politically undesirable judges and replacing them with partisans, all men with dubious qualifications. James II made history by dismissing 12 judges in four years, calling those judges who resisted following the king's line 'snivelling trimmers'.²⁸ These enduring attempts to undermine the independence of the judges came to a halt during the Glorious Revolution of 1688-1689 and afterwards under the reign of William III when all judges were appointed during good behaviour (*durante bene placito*), and the independence of judges, at least from the sovereign, was promoted.

1 2 2 Appointment, tenure and removal

The Act of Settlement of 1701 proved to be the essential tool whereby the tenure of superior court judges was secured by statute against the influence of the Crown.²⁹ By 1760, the last loop-hole was closed when continuity in office was guaranteed and terms of office retained validity even when judicial proceedings ceased upon a king's death and judicial authority was returned to the new king. The latter advised the Chancellor on the re-appointing of judges, and former appointments did not necessarily have to be renewed.³⁰ Until today, judges of the High Court and other leading judges hold office *durante bene placito* until they turn 75 years of age.³¹ Circuit judges are retired at the age of 72.³²

²⁸ Quoted at Holmes, *Legal Instruments*, 284. Note also Shetreet, *Judges on Trial*, 8-9.

²⁹ Shetreet, *Judges on Trial*, 10-11. For the earlier period see also Brand *Formation*, 116.

³⁰ Baker, *Introduction*, 146; Shetreet, *Judges on Trial*, 10. A number of original writs of appointment of superior court judges are included in Sainty, *Judges of England*, 243-268.

³¹ Section 11 (2) Supreme Court Act of 1981 and s 2 (1) Judicial Pensions Act of 1959.

³² Section 17 Courts Act of 1971.

Whereas tenure of office as an essential feature of judicial independence is statutorily protected, to the present day there are no provisions for reviewing judicial appointments to the benches of the superior courts to ensure that decisions are made on the basis of adequate information and criteria. In 1706, for the last time, barristers appearing at Chancery who aspired to the Bench were supposed to bring to the traditional New Year's Day breakfast with the Lord Chancellor a pecuniary offering in support of their ambitions. Meanwhile, mystery continues to veil the aspect of appointment. To some extent, the royal right of appointment is still held to flow from the notion that the monarch is considered the fountain of justice.

Today, the Queen appoints Circuit and High Court judges on the recommendation of the Lord Chancellor. The Queen appoints Law Lords, Lords Justices of Appeal, the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, and the Vice-Chancellor on the advice of the Prime Minister who, in turn, relies to a considerable extent on the Lord Chancellor. David Pannick once described the selection process as resembling a papal conclave rather than the choice of law-makers in a modern democracy, and added, not unconvincingly, that the methods adopted continue to suffer from major defects to the detriment of the public interest.³³ Alternatively an appointment committee which represents the Law Society, the Bar, academic lawyers, the judiciary and lay members were suggested without success in 1972 by the Justice Sub-Committee.³⁴ The only ascertainable criterion for selection, nomination and appointment is that the nominee to the High Court must be a senior member of the Bar, that is he must have been a barrister of at least ten years' standing. A Court of Appeal Judge is required to have been a puisne judge or a barrister of at least fifteen years' standing.³⁵ Recorders, Justices of the Peace, solicitors or academics are not appointed.³⁶ Superior judges are subject to removal only upon an address of both Houses of Parliament.³⁷

³³ Pannick, *Judges*, 65-66; Manchester, *Modern Legal History*, 79-81. Shetreet, *Judges on Trial*, 46-54. For purchase of office in the seventeenth century see also Veall, *Law Reform 1640-1660*, 40-42.

³⁴ Pannick, *Judges*, 67-68. Shetreet, *Judges on Trial*, 83-84.

³⁵ Section 10 (3) Supreme Court Act of 1981. Partly outdated in this regard Shetreet, *Judges on Trial*, 54-55.

³⁶ Manchester, *Modern Legal History*, 80; Pannick, *Judges*, 58-59; Shetreet, *Judges on Trial*, 55-59.

³⁷ Shetreet, *Judges on Trial*, 87-114 and 129-151 provides for a most detailed account.

Judges of the inferior courts, particularly Justices of the Peace, used to be appointed by a special commission under the great seal.³⁸ In practice, however, the Lord-Lieutenant of the respective county made nominations, which required the approval by the Lord Chancellor. During the eighteenth century particularly, a large number of appointments were made purely on a political basis, and even in this century liberals have contended that appointees were predominantly from a conservative background. In 1910, advisory committees were created for every county and borough. The Lord Chancellor appointed *ad hoc* the members of the committees who were then in charge of the appointment process but there was no guarantee of a judge's continuing in office from one advisory committee to another. In 1973, the advisory committees ceased to exist and since then Justices of the Peace have been appointed by the Lord Chancellor on behalf and in the name of the Queen with the proviso that "...a Justice so appointed may be removed from office in like manner."³⁹ Considering the fact that inferior court judges outnumber the judges of the superior courts by far, one could say – with some exaggeration – that the majority of English judges hold office subject to the good will of the executive, since the Lord Chancellor is also a member of the government.⁴⁰ Undoubtedly this practice does not favour the principle of separation of powers and thus of judicial independence.⁴¹

Practically the same applies to the development of the conditions under which other inferior judges were appointed and held office, i.e., County Court judges as well as Recorders. Today Circuit judges are appointed by a royal warrant. They also hold office at the pleasure of the Lord Chancellor who can remove a judge on grounds of incapacity and misbehaviour.⁴²

³⁸ For the following see Baker, *Introduction*, 146; Manchester, *Modern Legal History*, 74-79; Pannick, *Judges*, 91-92 and 101-102, Shetreet, *Judges on Trial*, 27.

³⁹ S 6 (1) Justice of the Peace Act of 1979 as amended by s 65 Administration Act of 1982.

⁴⁰ For details see Manchester, *Modern Legal History*, 105-106; James, *Introduction*, 30-31; Shetreet, *Judges on Trial*, 114-115.

⁴¹ For the past 100 years or so it seems that traditional caution has restrained Lord Chancellors from abusing this power. For examples of dismissals of inferior judges see the examples provided for by Pannick, *Judges*, 91-93 and 101-102.

⁴² Section 17 (4) Courts Act of 1971. Further Pannick, *Judges*, 91-92; Baker, *Introduction*, 146; Manchester, *Modern Legal History*, 79; Shetreet, *Judges on Trial*, 22 who remarks critically that the Crown Court, different from the County Courts, is a superior court of unlimited jurisdiction and that therefore it is quite surprising that the Lord Chancellor was given such great powers over the judges of the Circuit Court.

1 3 Social background, professionalism and legal education of judges

Initially, judges of the superior courts were drawn from the ranks of the clergy. Later, a pool of appointees was formed by the so-called order of the coif, which assembled the serjeants-at-law, pleaders who had been appointed especially by the kings to perform litigation in regard to the Crown.⁴³ From about the late thirteenth and early fourteenth centuries, we witness the emergence of the Bar and the Crown's growing practice of choosing judges from this limited group of professionals.⁴⁴ Until the second half of the eighteenth century, landed families contributed quite substantially to the superior court benches. By the 1850's, a considerable restructuring had taken place and it was mainly members of families of so-called professional provenance who now occupied the benches. Social homogeneity among the members of the superior courts always existed. It is fair to say that about three quarters of today's superior court judges have had a public school and Oxbridge education before entering the Bar.⁴⁵ David Pannick makes the fitting comment that "...it is disturbing that our judges come from so narrow a range of the community."⁴⁶ This statement undoubtedly also applies to the fact that, with the apparent predominance of white males in the ranks of barristers, the English judiciary today includes only a few women and even fewer non-White judges.⁴⁷

Furthermore judges of the superior courts do not appear to enjoy specific education or preparation for their judicial office apart from the vast legal experience they accumulated at the Bar before being called to the Bench. In addition, English judges, unlike American judges, do not have legally trained clerks upon whom they can rely for research. The issue of judicial training appears to be a delicate one. Pannick quotes Lord Devlin who admitted quite frankly the defects of the English system and once described himself at the time when he was appointed to the Bench in 1948, as follows:

⁴³ Brand, *Formation*, 115-116.

⁴⁴ For details see especially Dawson, *Oracles*, 1-50; Baker, *Introduction*, 133-143 as well as Baker, *CLJ* 28 (1969), 205-229; Plucknett, *History*, 235-241. See also Holmes, *Legal History*, 273-274 with further references.

⁴⁵ See Manchester, *Modern Legal History*, 81; Pannick, *Judges*, 53.

⁴⁶ Pannick, *Judges*, 59.

⁴⁷ *Ibid.* at 50 and 59-60. In this context it is worth including a story Pannick tells of the American President Lyndon B Johnson who, when he appointed Thurgood Marshall as the first black Solicitor-General in 1965, is reported to have said that he wanted "...folks to walk down the hall at the Justice Department and look in the door and see a nigger sitting there." See also the overview provided by Manchester, *Modern Legal History*, 70-71 with respect to the pains the profession experienced over the past 150 years or so to overcome lack of qualification of women. Shetreet, *Judges on Trial*, 59-60 and 390.

"I had never exercised any criminal jurisdiction and not since my earliest days at the Bar had I appeared in a criminal court. Two days after I had been sworn in, I was trying crime at Newcastle Assizes..."⁴⁸

While most present day judges have at least a bachelor's degree in law or have undergone some compulsory training at the Bar, during the whole of the eighteenth and most of the nineteenth centuries there existed practically no legal education upon which future judges could draw, either at the universities or at the Inns of Court. Lord Campbell told the select committee of 1846 on English legal education that with regard to barristers all that

"...has been required has been that the candidate to be called to the Bar should be of fair character; that he should have kept a certain number of years upon the books of the Society: that he should have kept a certain number of terms by eating a certain number of dinners in the Hall each term, and have gone through the form of performing what are still called exercises, but which consist of a mere farce of a case being stated, and a debate on each side..."⁴⁹

In its report, the committee drew heavily on the contemporary situation at German universities, which offered a range of preparatory studies before a student was admitted to the law faculty of a university; where, furthermore, a large staff was engaged in the teaching of law; and where attendance at lectures and examinations was compulsory. It should not be forgotten that although in the middle of the nineteenth century Germany's (historical) legal science and its deep-rooted foundation at the universities probably provided one of the most advanced and innovative educational systems of the age, the differences from the situation in England particularly were immense. This is also true if one compares the situation in England with the legal training during the last century in the Netherlands, France or even the United States, but not, however, from that in South Africa.⁵⁰

Several committees forwarded proposals and alternatives over the second half of the century without apparent success.⁵¹ Only in the period between the First and the Second World Wars were the law faculties, which by then were fairly well equipped and staffed, flooded by masses of law students. Junior barristers now were usually in possession of a university degree. In 1958, pupillage for barristers was made compulsory and in 1970 obligatory learning exercises,

⁴⁸ Pannick, *Judges*, 69.

⁴⁹ Quoted from Manchester, *Modern Legal History*, 55.

⁵⁰ For the situation in the USA see Reimann, *Historische Schule und Common Law*. For the developments in South Africa see below at chapter VII 1 1 3 and 1 3.

⁵¹ See the detailed account of Manchester, *Modern Legal History*, 55-63.

abandoned as long ago as 1642, were reintroduced.⁵² The Inns of Court' School of Law and the Council of Legal Education exist for the continued education of barristers and thus of prospective judges, but until today the practical skills and experience acquired during private practice make up the most important components of judges' training. Whether or not that makes them more suited for a judgeship remains a moot point.⁵³

Whereas superior court judges have always had at least the advantage of years of standing as a barrister as preparation for their high office, inferior judges, notably Justices of the Peace, were for centuries lay judges. Only in 1949 did the Justices of the Peace Act provided a statutory basis for the training of justices. The only professional assistance offered to the justices were the so-called Clerks of the Peace, usually lawyers by training. By the 1830's, Justices of the Peace were subject to stringent public criticism because of their lack of formal training, corruption and over-enthusiastic enforcement of laws, and also because of partiality on class lines. This development had in a sense been foreseen as early as the fourteenth century by the then Lord Chief Justice Scrope, who opposed the commission of local gentry to the office of Justice of the Peace with the argument that they would only use the law for the pursuit of factional rivalries.⁵⁴

It is interesting that to some extent the social class to which English Justices of the Peace belonged bears some resemblance to the social class from which Dutch local judges were drawn. English justices were drawn from among the most worthy men in the county who had an excellent reputation. Moreover, it was provided by statute that no one was to be appointed justice who did not have a rental income from his land of £ 20 p.a. A subsequent statute provided for a total of £ 100 p.a. clear of all deductions. Men of lesser wealth were considered "...both covetous and contemptible..."⁵⁵, an argument encountered earlier in connection with the influence of the Dutch regent-patriciate on the composition of the benches of the local lower courts in the Netherlands.⁵⁶ Similarly, an historian has pointed to the 'loose governing

⁵² Baker, *Introduction*, 148-149; Manchester, *Modern Legal History*, 64-65. For recent developments and criticism of the present practice of appointing judges merely from the ranks of the senior barristers see Pannick, *Judges*, 49-56.

⁵³ Pannick, *Judges*, 52-53.

⁵⁴ Holmes, *Legal Instruments*, 274.

⁵⁵ Blackstone, *Commentaries*, vol. I 352-353.

⁵⁶ See above chapter V 1 and 4 I 3 3 at the end. For further details Manchester, *Modern Legal History*, 78; Sharpe, *Enforcing the Law*, 100-102.

oligarchy' of justices and other respectable members of society who ruled the local cosmos.⁵⁷ Thus, until well into the first half of this century, we find practically no members of the working class on the benches of the inferior courts, which were composed almost exclusively of members of the gentry and, later, the middle class.

Even though the government acknowledged the apparent deficiencies of the system, there was no serious attempt to reform the system of Justices of the Peace at its roots, for instance by establishing a salaried local professional judiciary.⁵⁸ All that was done was to push for a tighter supervision of the justices by the superior courts. In this regard, reference must be made to a direct and an indirect approach. The latter, judicial liability, appeared first owing to a lack of proper means of appeal or review in early English law, again not dissimilar to the development of Roman law. The direct approach, which emerged somewhat later, was through writs of error, *mandamus* and particularly *certiorari*. We will return to this point in due course.

2 GENERAL PRINCIPLES OF JUDICIAL LIABILITY⁵⁹

The liability of judicial officers is exclusively a personal liability because the plaintiff has no right of action against the Crown.⁶⁰ There is no public liability on behalf of the judiciary for

⁵⁷ *Ibid.* at 101.

⁵⁸ For reasons to refuse these modifications see Manchester, *Modern Legal History*, 77-78.

⁵⁹ The leading articles and treatises on the English (and American) law of judicial liability can be found in the following articles: Rubinstein, *TLJ* 15 (1964), 317; Thompson, *MLR* 21 (1958), 517; Brazier, *Public Law* 5 (1976), 397; Sheridan, *MLR* 14 (1951), 267; Feldthusen, *NBLJ* 29 (1980), 75; Feinman and Cohen, *SCLR* 31 (1980), 201; Barth, *CWLR* 27 (1976-77), 727; Schrage, *Legal History* 17 (1996), 101. Furthermore recourse can be held to the following works: Olowofoyeku, *Suing Judges*, 33-124; Kniffka, *Haftungsrechtliche Privilegierung*; Rudd, *Responsibility of Judges*, 331; *Salmond and Heuston on Torts*, 165-167, 402-404; *Clerk and Lindsell on Torts*, 1475-1491; *Street on Torts*, 102 and 447; *Winfield and Jolowicz on Tort*, 637; Carter-Ruck, *Libel and Slander*, 130. Reference must also be to the following international report: For the most comprehensive overview on the recent developments with regard to judicial responsibility in 25 countries of civil law and common law tradition see the *General Report of the 11th International Congress of the International Academy of Comparative Law* Caracas 1982 which formed the basis of Cappelletti's comprehensive article in *AJCL* 31 (1983), 1-62.

⁶⁰ A detailed survey of the position of the relevant law in England and America as well as proposals for a liability of the state for judicial wrongs in common law systems can be found in Olowofoyeku, *Suing Judges*, 157-221. Olowofoyeku

tortious acts. Accordingly, English law accepts neither a type of vicarious liability for judicial officers nor the primary liability of the Crown for wrongful exercise of its sovereign powers by the judiciary. The reasons for this are that, firstly, in English law, as in many other common law systems, the essential requirement for vicarious liability of the Crown, namely that a judicial officer is a servant of the state, is rejected. On the contrary, judicial officers are regarded as members of an independent power, the judiciary.⁶¹ Secondly, there is no acceptance of the notion of primary liability of the Crown, based on the presumption that the judiciary is part of the Crown's government and that thus the wrongful exercise of judicial power is a wrongful exercise of sovereign power. On the contrary, according to s 2 (5) of the Crown Proceedings Act of 1947 the Crown shall not be liable in:

“...respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of the judicial process.”

However, under the Act the Crown can be held liable for the acts of other officers and civil servants. This liability is often referred to as State liability or ministerial liability as opposed to judicial liability. The only exception to this general rule with regard to judicial officers is the magistrates' indemnity based on s 53 of the Justices of the Peace Act of 1979, which will be discussed later.

Liability of judicial officers is the consequence of the tortious act of a judicial officer.⁶² Most likely, a judicial officer will be answerable for trespass to property, for trespass to the person, for false imprisonment or for defamation.

Judicial liability can arise only if no justification ground for the act in question can be raised by the judge. In English law, justification of an act is commonly discussed under defences. There are various types of defences to an action in tort. Generally speaking, one must distinguish between particular and general defences.⁶³ The former are peculiar to a particular

based his arguments *inter alia* on the decision of the Privy Council in *Maharaj v AG of Trinidad and Tobago* (No. 2) [1979] AC 385 PC which he considers a landmark decision. In this case it was held that the plaintiff was entitled to redress from the State for wrong imprisonment under s 6 of the Trinidad and Tobagoian Constitution. This section provided for damages irrespective of whether the wrongful act was committed by a judicial or non-judicial servant of the State.

⁶¹ See Atijah, *Vicarious Liability*, 77 fn14.

⁶² For an overview on the distinctions of the common law concept of torts compared to the civilian law of delict see Zimmermann, *Law of Obligations*, 907-913; *Clerk and Lindsell on Torts*, 1-141.

⁶³ See *Clerk and Lindsell on Torts*, 93.

tort; the latter apply to nearly all torts. The specific defence available to judicial officers is of a general nature and is widely regarded not only as a defence but as extended somewhat into personal immunity. This immunity must be distinguished from other defences such as necessity or mistake since it is not concerned with the nature of the tortious liability or a particular tort, but exclusively with particular persons, i.e., judicial officers, and with the fact that judicial officers for policy reasons need to be protected more extensively from actions than ordinary individuals. Although, for centuries there existed a strong tendency in English law towards total immunity of judicial officers, it is important to note that today the judicial officer's personal immunity is not absolute. Under certain, albeit limited, circumstances no defence will be available for a judicial officer and liability can arise.

Within this personal immunity, two particular defences must be distinguished. One is 'immunity from suit' which is a defence of the sued judge against actions of trespass or false imprisonment. The other is the defence of 'absolute privilege in judicial proceedings', which has been developed in the law of defamation. The rationale of the two concepts needs to be distinguished. It seems that some confusion has arisen since the various authorities have not always drawn this distinction and have borrowed arguments in cases of absolute privilege from cases of immunity from suit, and *vice versa*.

The concept of immunity from suit focuses on the protection of judicial independence, thereby encouraging fearless and principled decision making, as well as recognising and protecting the finality of a court's decision. Absolute privilege on the other hand is focused on freedom of communication in court, where the necessity arises of protecting participants in legal proceedings from fear of consequent legal claims against them. While both defences address distinct persons, immunity from suit is confined to judicial and quasi-judicial officers. Absolute privilege, however, covers everyone involved in judicial proceedings. Such persons are judges, jurors, counsel, parties, witnesses, clerks, etc. The scope of absolute privilege is thus much wider than that of immunity from suit.

Many seemingly arbitrary divisions and peculiarities of modern English law of judicial liability can be explained only by reference to the historical development of judicial liability. Therefore, it is essential to examine closer the background and roots of this concept. The

sources of English law of judicial liability are found primarily in the common law.⁶⁴ It will therefore be necessary to make frequent references to case law.

3 HISTORICAL DEVELOPMENT OF JUDICIAL LIABILITY FOR WRONG JUDGEMENTS AND DEFAMATION

3.1 Historical development before 1600

3.1.1 Immunity from suit

As in Roman law, judicial immunity was not provided for in early English law. Relatively precise regulations relating to judicial liability can be found as early as the eleventh century in some of the ordinances of William I. Under these ordinances the judges were accountable to the king, not to the litigants. Judges had to pay a fine in cases of either deliberate or mistaken false judgement.⁶⁵

From the twelfth until the seventeenth century, English common law witnessed the emergence of the first of the two roots of the present law of judges' liability: the distinction between courts of record and not of record.⁶⁶

Medieval English law drew no distinction between the correctness of a judge's decision and the rectitude of his conduct.⁶⁷ Judges continued to have no special immunity. There existed neither a system of appeals nor any such thing as prerogative orders, i.e., the writs of *certiorari*, prohibition and *mandamus* which one day were to become a fashionable means of redress against the conduct of inferior court judges.⁶⁸ In those days, parties were limited to the

⁶⁴ It is important to note that the liability of Justices of the Peace is regulated by s 44-52 of the Justices of the Peace Act of 1979 which replaced the Justices Protection Act of 1848.

⁶⁵ See Olowofoyeku, *Suing Judges*, 9-10 for details.

⁶⁶ For a detailed survey of the development of the judicial record see Holdsworth, *History*, vol.V 157-160; Plucknett, *History*, 257-258; Baker, *Introduction*, 118-119; Weber, *Legal History* 9 (1988), 181.

⁶⁷ Holdsworth, *History*, vol I 214.

⁶⁸ *Ibid* at 213-214.

so-called complaint of false judgement, *faussement de jugement* or *Schelte*, a feature common to the legal systems of Europe in the Middle Ages as we have seen in the previous chapters.⁶⁹ As was the case in France, the Netherlands and in Germany, complaint of false judgement took the form of semi-criminal proceedings against the judge.⁷⁰ It was only an indirect attack against a decision since it was directed against the judge personally rather than against the decision. The annulment of a judge's decision could lead to the payment of damages to the litigants, to a fine payable to the king and to the permanent loss of the right to hold a court.⁷¹ Complaint of false judgement could only be urged in the king's court and thus became a royal plea.⁷² In the thirteenth century, the complaint of false judgement was treated increasingly by the king's court as an efficient means of correcting judicial decisions of inferior courts and, by the fourteenth century, a distinction between the two components of the complaint, namely complaints against a judgement and complaints against a judge, had become apparent.⁷³

From the fourteenth century onwards, there appears the distinction between courts of record and those not of record. A principle which was to become known as the so-called sanctity of the record was applied, which not only changed the procedures as to complaint of false judgement but, as we will see, provided for the first time for the concept of judicial immunity from liability.

In the early Middle Ages, a record was the protocol of the court proceedings, written in Latin. Only the common law courts kept a Latin record.⁷⁴ Inferior courts kept no record.⁷⁵ The kings enjoyed a privilege in that their judgements on events that had taken place in their presence were simply not contestable: 'the king can do no wrong'. In time, the royal privilege was conferred on the court in the absence of the king, which, as shown earlier, was increasingly the case from the thirteenth century onwards.⁷⁶ It was the common law courts to which this privilege was first extended. Thereafter, parties could not find fault with a decision of the

⁶⁹ See above at chapter III 5 and chapter V 4 1 3 2.

⁷⁰ Holdsworth, *History*, vol.I 213.

⁷¹ *Ibid.*

⁷² Maitland and Pollock, *History*, vol.II 663 *et seq*; Palmer, *County Courts*, 151-159; Brand, *Formation*, 110.

⁷³ Holdsworth, *History*, vol.I 213-215.

⁷⁴ The other courts which emerged later, namely Chancery, Star Chamber, Requests as well as Admiralty also kept a record but notably this was not a Latin record.

⁷⁵ Holdsworth, *History*, vol.V 159; Maitland and Pollock, *History*, vol.II 669.

⁷⁶ See above at fn3 *et seqq.*

common law courts. Findings of these courts included in the record were generally considered final and incontestable. The only exception applied where a formal error appeared openly on the courts' record.⁷⁷ The only way of questioning a decision of a court of record henceforth was the so-called writ of error. Consequently, the complaint of false judgement was no longer available, or rather, being restricted now to courts not of record.⁷⁸ "The writ of error lies for some supposed mistake in proceedings of a court of record; for, to amend errors in a base court, not of record, a writ of false judgement lies."⁷⁹

Evidently the concept of the sanctity of record resulted in the immunity of the judges of the common law courts. The emergence of judicial immunity was necessary to protect the concept of sanctity of record: this concept would have been severely undermined if a litigant could have gone 'behind the record' with a claim against a judge based on facts which were not on the record.⁸⁰ The immunity of the judges of the common law courts was, however, restricted to cases where a judge gave judgement within his jurisdiction. If a judge acted outside his jurisdiction he was not protected by this privilege since the matter was *coram non judice* and hence the record could be traversed.⁸¹ The judge was then personally liable to the aggrieved party.⁸²

The position as to judicial immunity from liability in England before the seventeenth century can thus be summarised as follows: Judges of courts of record enjoyed immunity from suit as long as they acted within their jurisdiction. Judges of courts not of record were however personally liable for any misapplication of the law. Courts of record in those days were solely

⁷⁷ Holdsworth, *History*, vol.I 214.

⁷⁸ Thorne, *Courts of Record*, 256; Plucknett, *History*, 104 and 387-388 with regard to writ of error: "The proper expression will be 'error on the record' if the acts of the Common Pleas [court of record] are to be reviewed, and the procedure will be a writ of error to move the record (or rather, a copy of it) into the King's Bench..."; Baker, *Introduction*, 118-119; Maitland and Pollock, *History*, vol.II 668-669; Holdsworth, *History*, vol.I 215-217.

⁷⁹ Blackstone, *Commentaries*, vol.III 405; Maitland and Pollock, *History*, vol.II 66.

⁸⁰ *Ibid.*, vol V at 235.

⁸¹ *Ibid.*, vol V at 236.

⁸² See also *Green and the Hundred of Buccle-Churche Case* 74 ER 294 (1589): "...for such thing as he doeth as judge, no action lieth."

the courts of the sovereign which exclusively held the right to imprison and fine.⁸³ Thus limited immunity was provided for a limited group of judges.⁸⁴

3 1 2 Absolute privilege

A judge can raise the defence of absolute privilege exclusively in an action in defamation. Certain occasions are deemed to be so important that those making statements are not liable even though their statements might be untrue or even malicious. These instances all have in common that freedom of communication is paramount.

Generally speaking defences developed late in the history of the law of defamation. Only by the middle of the eighteenth century was the defence of justification established. This defence, however, had a wide scope and covered categories such as truth, absolute and qualified privilege and fair comment. Of these the plea of truth was the initial defence⁸⁵, the defence of privilege appearing only from the fifteenth century onwards.⁸⁶ Although the term privilege was not common until the nineteenth century and consequently no distinction was drawn between absolute and qualified privilege, it is obvious that English law accepted the justification ground that the making of a defamatory statement was rendered lawful by certain circumstances.⁸⁷ As early as 1585 it was adjudged:

“...that if one exhibits articles to justices of the peace against a certain person, containing divers great abuses and misdemeanours...in this case the party accused shall not have for any matter contained in such articles any action upon the case, for they have pursued the ordinary course of justice in such case.”⁸⁸

In a case before Star Chamber in 1591, it was held that no action lay for any of the contents of a bill exhibited in court, however false the matter, since the exhibition took place in the course

⁸³ Blackstone, *Commentaries*, vol.III 23-24. For more detailed information as to the roots of the essential requirements of imprisonment and fine see Thorne, *Courts of Record*, 256-266; Pollock and Maitland, *History*, vol.II 517-518; Holdsworth, *History*, vol.V 158-160.

⁸⁴ Feinman and Cohen, *SCLR* 31 (1980), 206.

⁸⁵ Holdsworth, *History*, vol. V 207.

⁸⁶ *Ibid.* at vol.VIII 376.

⁸⁷ Ranchod, *Foundations*, 115.

⁸⁸ *Cutler v Dixon* (1585) 4 Co. Rep. 14b.

of justice.⁸⁹ By the first quarter of the seventeenth century, it was well established that no action lay against judges, witnesses, or counsel for defamatory statements made during court proceedings.⁹⁰ It is of the utmost importance, however, that at this stage privilege did not cover words spoken maliciously. From a case in 1606, it is clear that a statement *prima facie* privileged would lose its privileged status if it were spoken with malice.⁹¹

The early cases leave much open to speculation as to which definite policy considerations paved the way for the introduction of such privilege. However, it can be deduced from the judgement in the case of *Cutler v Dixon* that one reason was “...fear of infinite vexation...”, fear of an endless stream of actions and counter-actions in defamation.⁹²

3 2 Historical development after 1600

3 2 1 Immunity from suit

3 2 1 1 *The two leading cases: Floyd v Barker and The Case of the Marshalsea*

The growing conflict between common law courts and the prerogative courts from the late sixteenth century onwards, set the stage for further developments in the area of judicial immunity. Two cases, *Floyd v Barker* and *The Case of the Marshalsea*, undoubtedly laid the foundations of modern English law in relation to judicial liability. The former stressed the importance of judges’ immunity; the latter defined the exceptions to this concept.

The conflict between English common law courts and their prerogative rivals has already been described. By 1610, the dispute culminated in the crucial question of whether the Court of Chancery was empowered to undermine decisions of the common law courts by arrest of execution of these decisions while a new hearing – at the Chancery Courts – was scheduled. Obviously these new hearings could result in a different verdict. The status of the courts of

⁸⁹ *Buckley v Wood* (1591) 4 Co. Rep. 14.

⁹⁰ Holdsworth, *History*, vol. VIII 376.

⁹¹ *Brook v Montague* Cro Jac 90.

⁹² *Cutler v Dixon* (1585) 4 Co. Rep 14 b.

record now served well as a technical argument for lawyers at the common law courts to protect their position and to cripple their rival courts.⁹³ *Floyd v Barker* was one of the leading cases in this regard.⁹⁴ In this case a judge of assize, Barker, presided at the trial of one William Price who was sued for murder. Upon a verdict of guilty Barker gave judgement and Price was sentenced to suffer the death penalty. Subsequently, Barker was charged in the Court of Star Chamber (a prerogative court) with conspiracy.

Two arguments were raised by the Lord Chief Justice Coke with regard to this charge, both of which were aimed at restraining the growing influence of the Court of Chancery.⁹⁵ On the basis of some dicta he had found in the Year Books, Coke argued that only courts of record could fine and imprison.⁹⁶ Since all courts except the common law courts were technically not courts of record, these courts lacked the legal right to exercise similar powers and thus all judgements of the prerogative courts which had put people in jail had to be considered invalid. In fact, Coke in his function as Chief Justice of the Court of King's Bench in those years released numerous prisoners on petitions of *habeas corpus*.⁹⁷

Coke's second argument is of particular relevance to our topic. He concluded from the common law courts' status as courts of record that the judges of these courts were immune from prosecution and could not be held responsible before any other court.⁹⁸ Again, the latter point was substantiated by two arguments. One argument was that if judicial matters of record were in question, there would never be an end of causes, and controversies would last

⁹³ Holdsworth, *History*, vol.V 159 and 1924 *JOSPTOL*, 17-21; Weber, *Legal History* 9 (1988), 189-90. Thorne, too, makes it plain that Coke's approach was mainly directed against the Court of Chancery. See *Courts of Record*, 266.

⁹⁴ 77 ER 1305 (1608).

⁹⁵ Weber, *Legal History* 9 (1988), 187.

⁹⁶ *Beecher's Case* (1609) 8 Co. Rep. at 60 quoted at Holdsworth, *History*, vol.V 159. Coke *inter alia* relied on YB (1422-1461), Hil. 9 Hen. VI f. 60. Further note Thorne's detailed (and critical) discussion of Coke's approach in *Courts of Record* 256-266. At 256 Thorne states that Coke "...is responsible in large measure for the curious modern definition of a court of record as one that can fine and imprison, and in reaching this definition there is every reason to believe that he used cases to give, if not a wholly new meaning to the distinction, at least a new emphasis to it."

⁹⁷ Baker, *Introduction*, 92.

⁹⁸ "Inasmuch as the judges of the realm have the administration of justice under the king to all his subjects, they ought not to be drawn into question for any supposed corruption which extends to the annihilating of a record or of any judicial proceeding before them...and not to answer any suggestion in the Star Chamber." *Floyd v Barker* 77 ER 1305 (1608) at 1307.

indefinitely.⁹⁹ The second point raised by Coke was that it was essential to the administration of justice that judges were not in fear as to the consequences of their decisions.¹⁰⁰

“The judges of the realm...ought not to be drawn into question...for they are only to make an account to God and the King, and not to answer to any suggestion in the Star-Chamber; for this would tend to scandal and subversion of all justice.”¹⁰¹

Coke’s arguments, for the first time, introduced full scale legal policy considerations in the doctrine of immunity from suit, considerations which still prevail.¹⁰² A further important consequence of *Floyd v Barker* was the definition of the limits of the judges’ immunity. All ‘extra-judicial’ acts by the judiciary would henceforth fall outside the scope of judges’ privilege. Extra-judicial acts were, for instance, false and malicious prosecutions and conspiracies of judges outside of court.¹⁰³

The designation of specific acts in *Floyd v Barker* as extra-judicial indicates how closely this issue was related to the question of defining the limits of the courts’ jurisdiction. Only five years later, in *The Case of the Marshalsea*, was Coke able to define these limits more precisely.¹⁰⁴ In this case, actions of trespass and libel and slander were brought against the officers of the Marshalsea’s Court, a court which had jurisdiction over the king’s household.¹⁰⁵ The Court’s officers defended themselves with the argument that they had acted upon order of the Court. The plaintiff responded that the Court had no jurisdiction as to either the respective persons, since they were not of the king’s household, or as to the matter, since none of the king’s household was affected. Coke decided that:

“When a court has jurisdiction of the cause, and proceeds *inverso ordine* or erroneously there...no action lies...but when the court has not jurisdiction of the cause, there the whole proceeding is *coram non judice*, and (an) action will lie...”¹⁰⁶

Subsequent cases confirmed this rule.¹⁰⁷ Thus a concept of ‘want of jurisdiction’ was formulated to define finally and clearly the limits of the immunity of judges.

⁹⁹ *Ibid.* at 1306 and Holdsworth, *History*, vol.VI 237.

¹⁰⁰ *Ibid.*

¹⁰¹ *Floyd v Barker* 77 ER 1305 (1608) at 1306.

¹⁰² Feinman and Cohen, *SCLR* 31 (1980), 207-209.

¹⁰³ *Floyd v Barker* 77 ER 1306 (1608) at 1306.

¹⁰⁴ 77 ER 1027 (1613).

¹⁰⁵ For details see Blackstone, *Commentaries*, vol.IV 273-274.

¹⁰⁶ 77 ER 1027 (1613) at 1038.

¹⁰⁷ For details see the passage right below.

3 2 1 2 *Disappearance of the distinction between courts of record and not of record*

The decisions that elaborated on the distinction between courts of record and not of record undoubtedly laid the foundations for the modern English law of judicial liability. However, this distinction ceased to have importance from the late seventeenth century onwards.¹⁰⁸ The reasons for this were twofold.

On the one hand, it became obvious that Coke's distinction between the two types of court was too formalistic. Although a technical distinction did in fact still exist, practically all other non-Latin records had assumed the same degree of binding force as those of the common law courts, and above that "...the power to fine and imprison was habitually exercised by the council, star chamber, chancery, admiralty, and high Commission...".¹⁰⁹ On the other hand, the idea of protection of judicial immunity had extended even to courts not of record. The earliest example is provided by *Terry v Huntington* where commissioners of excise, obviously not a court of record, were sued in conversion.¹¹⁰ It was held that they were liable on the grounds that they had exceeded their jurisdiction and consequently had acted *coram non judice*. In 1703 the House of Lords reversed this decision in *Ashby v White*, where a returning officer had refused to accept the plaintiff's vote at an election. In the House of Lords a majority decided that the officer's act was privileged since he had acted as a 'quasi-judge'.¹¹¹ This principle was affirmed by Lord Tenterden CJ in *Garnett v Ferrand* where he stated clearly that: "Even...justices...not of record cannot be called in question for an error in judgement, so long as they act within the bounds of their jurisdiction."¹¹² The eighteenth and the early nineteenth centuries thus witnessed a considerable expansion in the scope of judicial immunity.

3 2 1 3 *Superior courts and inferior courts*

After the importance of distinguishing courts of record and not of record vanished, another principle increasingly became essential: the differentiation between the immunity accorded to

¹⁰⁸ Feinman and Cohen, *SCLR* 31 (1980), 211.

¹⁰⁹ Thorne, *Courts of Record*, 267.

¹¹⁰ 145 ER 557 (1668).

¹¹¹ *Ashby v White* 92 ER 126 (KB 1703); reversed by the House of Lords 1 ER 417 (HL 1703).

judges of superior and judges of inferior courts.¹¹³ This development formed the second root of the modern English law of judicial liability, and led finally to the comprehensive immunity of judges of superior courts and to the somewhat lesser immunity of inferior court judges. How was this distinction established?

The first aspect was one of jurisdiction. The inferior courts' jurisdiction was limited by issues of subject matter, place or persons. Superior courts enjoyed general jurisdiction. This principle, for example, was stated in the case of *Peacock v Bell*:

"Nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and...nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged."¹¹⁴

Consequently it was held that an inferior court can exceed its jurisdiction whereas a superior court basically cannot because it has the jurisdiction to determine its own jurisdiction. Thus, an erroneous conclusion as to the extent of the jurisdiction was not considered an act outside the superior courts' jurisdiction but merely an abuse of jurisdiction.¹¹⁵ As a result it is clear that while theoretically all judges were liable for acts outside their jurisdiction, practically this was irrelevant to superior court judges because they could never act *coram non judice*.

The second aspect was one of control of the respective courts. Inferior courts were controlled by the superior courts by means of prerogative orders, but superior court judges were answerable only to God and the king. There existed simply no legal tribunal for a party to enforce that liability.¹¹⁶ As early as 1677, it was declared in *Hammond v Howell* that:

"If he [the judge] doth anything unjustly or corruptly, complaint may be made to the king, in whose name judgements are given, and the judges are by him delegated to justice."¹¹⁷

Thus superior court judges were immune from suit in another court whereas inferior court judges were answerable to their superior brethren.

¹¹² 6 B & C 611 at 626.

¹¹³ Holdsworth, *History*, vol. VI 238.

¹¹⁴ 85 ER 84 (1666).

¹¹⁵ Holdsworth, *History*, vol. VI 239.

¹¹⁶ *Ibid.*

¹¹⁷ 86 ER 1035 (1677). See also *Sirros v Moore* [1974] 3 WLR 459 at 468-469.

The third aspect, the superior court judges' immunity was extended to allegations of malice, corruption, or oppression:

"It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly."¹¹⁸

And Lord Esher stated in *Anderson v Gorie* that "...no action lies for acts done...by a judge in the exercise of his office, although his motive is malicious...".¹¹⁹

Inferior court judges on the other hand remained liable not only for acts done outside their jurisdiction but also for acts within their jurisdiction which were done maliciously and without reasonable and probable cause.¹²⁰ This basic principle was summarised by Erle J in *Taylor v Nesfield*:

"If the act of a magistrate is done without jurisdiction, it is a trespass; if within the jurisdiction, the action rests upon the corruptness of the motive; and, to establish this, the act must be shewn to be malicious."¹²¹

The rules with regard to malice originated from two different sources. First, the notion developed that a malicious act by an inferior court judge was an act outside his jurisdiction and thus could be identified as *coram non judice*. The second source is the dissenting decision of Holt CJ in the King's Bench decision in *Ashby v White*, which was accepted as valid law by the House of Lords in the reversal, where it was held that according to the doctrine of *ubi jus, ibi remedium* malice on the part of an inferior court judge must have the consequence of liability.¹²² De Grey CJ in *Miller v Seare* made the point clear when he said: "The protection, in regard to the superior courts, is absolute and universal...".¹²³ The position of judges of inferior courts was somewhat less privileged.

¹¹⁸ Crompton J in *Fray v Blackburn* (1863) 3 B & S 576 at 578.

¹¹⁹ *Anderson v Gorie* [1895] 1 QB 668 at 670; see also *Taaffe v Downes* 13 ER 15 and *Hammond v Howell* 86 ER 1035 (CP 1677).

¹²⁰ See s 1 Justices Protection Act of 1848.

¹²¹ 118 ER 1312 (KB 1854).

¹²² *Ashby v White* 92 ER 126 (KB 1703); reversed by the House of Lords 1 ER 417 (HL 1703).

¹²³ (1777) 2 Wm Bl 1141 at 1145.

3 2 1 4 Considerations of legal policy

Undoubtedly, personal liability of the inferior court judges became a means of discipline in the hands of the superior courts. As indicated in the first part of this chapter, a considerable share of local government from the sixteenth until the nineteenth centuries, including the dispensation of justice, was carried out by Justices of the Peace. The justices' incompetence, their frequent trespass of jurisdiction, as well as grossly incorrect decisions resulted in the growing control of the inferior courts by the superior courts. Supreme Court judges were very strict with the courts below them¹²⁴, and, according to one contemporary observer, the superior courts did "...now and then correct the dulnesse of these justices, with some strokes of the roddle, or spur."¹²⁵ Not only was the threat of liability available to the superior courts as a roddle, but also the so-called prerogative writs of *mandamus* and *certiorari* to which we have referred already.

Only from the seventeenth century onwards, it was the King's Bench that claimed the authority to review decisions of the Justices of the Peace and accordingly developed a number of devices to exercise this jurisdiction. By means of the writ of *mandamus*, the Court insisted that it had the power to require an inferior tribunal to perform its statutory duties. The writ of *certiorari* was developed in order to review decisions of the justices on the ground either that their courts lacked jurisdiction or that although within their jurisdiction they had based their decisions on inadequate assessment of facts.¹²⁶ Consequently, it must be said that the historical development in particular was responsible for the remarkable fact that in English law for quite some time the indirect control device in the form of judicial liability preceded the direct device of prerogative orders.

There is an interesting analogy with the state of republican Roman law where, owing to the similar absence of a worked out system of appeal or review, judicial liability appeared as the only solution to the problem of providing a litigant with a remedy. When a system for review and appeal was established, as in Roman law, the question was raised as to what purpose judicial liability could now serve? With respect to inferior courts the answer was simple.

¹²⁴ *Sirros v Moore* 3 WLR [1974] CA 459 at 468.

¹²⁵ Cited by Lord Denning MR at *ibid*.

¹²⁶ Kniffka, *Haftungsrechtliche Privilegierung*, 39; Baker, *Introduction*, 128-130; Holmes, *Legal Instruments*, 277-278; Holdsworth, *History*, vol. IX 104-125; De Smith, *CLJ* 11 (1951), 40-56.

Judicial liability once again was retained as a useful tool for disciplining the numerous inferior court judges. However, as Ormrod LJ observed in *Sirros v Moore*, the right of the Supreme Courts to control the lower courts was frequently misused since:

“In many situations the law provided no other form of remedy, and the courts used this one (civil liability) so vigorously that Parliament had to intervene on several occasions to temper the wind to the shorn lamb.”¹²⁷

The response of Parliament referred to by Ormrod LJ, was a series of acts regulating the liability of Justices of the Peace.¹²⁸ From the preamble of the Justices Protection Act of 1751, it is evident that Parliament was well aware of the duality of the problem of protecting both the justices’ independence and the peoples’ interests:

“Whereas Justices of the Peace are discouraged in the Execution of their Office by vexatious Actions brought against them for or by reason of small and involuntary errors in the Proceedings: And whereas it is necessary that they should be (as far as is consistent with Justice, and the Safety and Liberty of the Subjects over whom their authority extends) rendered safe in the Execution of the said office and trust: and whereas it is also necessary that the Subjects should be protected from wilful and aggressive abuse of the several Laws and Statutes committed to the Care and Execution of the said Justices of the Peace...”¹²⁹

Notwithstanding these comments, the wide scope of judicial liability was not essentially modified by this Act or by its successors. Justices of the Peace remained liable for malicious acts done within their jurisdiction and any act outside the same.

In view of the strong influence of policy considerations, it is not surprising that they also account for the establishment of the total immunity of superior court judges. But here, ironically, judicial independence was accepted as an essentially convincing argument in favour, not only of qualified but of total immunity from liability. According to Crampton J in *Fray v Blackburn*:

“... [The] public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions.”¹³⁰

Judicial independence was also stressed in the well known words of Lord Tenterden CJ in *Garnett v Ferrand*:

¹²⁷ *Sirros v Moore* 3 WLR [1974] CA 459 at 482 per Ormrod LJ.

¹²⁸ As early as 1609 a Justices Protection Act was legislated which was consolidated and amended by the Justices Protection Acts of 1751, 1803 and 1848.

¹²⁹ Justices Protection Act of 1751 quoted by Feinman and Cohen, *SCLR* 31 (1980), 220.

¹³⁰ (1863) 3 B & S 576 at 578.

“This freedom from action and suit...is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgement...”.¹³¹

In the light of this development Lord Denning’s MR observation in *Sirros v Moore* appears as perfectly sound, namely that: “...the superior courts were never so strict against one of themselves.”¹³²

3 2 2 Absolute privilege

Most of the foundations of the modern law of defamation emerged as late as the sixteenth and seventeenth centuries, and it was probably uncertainty as to the significance of malice in this field that hindered the distinction between absolute and qualified privilege until well into the second half of the eighteenth century. Only from 1769 onwards can one talk about a distinction between these two concepts. That year saw an obiter dictum¹³³ by Lord Mansfield which was adopted some 17 years later as the *ratio decidendi* in the case of *Weatherston v Hawkins*, where it was held that: “No action lies for giving the true character of a servant...unless there should be extraordinary circumstances of express malice.”¹³⁴

With the introduction of the concept of malice in the law of defamation as a means of destroying a defendant’s defence, the question arose as to which occasions would fall under qualified and which under absolute privilege. With the answer to this question, finally, the distinction between absolute and qualified privilege emerged. Undoubtedly, absolute privilege had to be confined to circumstances where a special defence of an individual was not deemed necessary, but further specific occasions were identified where it was in the interest of the public that people should be able to speak and write without fear that they might have to answer for what they said. Here again the public interest became the crucial point. It is fair to say that the distinction between absolute and qualified privilege arose from a gradation of statements that public policy required to remain as absolutely privileged and those *prima facie* privileged statements that were undermined by malice. By the beginning of the nineteenth century, this distinction was well established.

¹³¹ 6 B & C 611 at 625.

¹³² [1974] 3 WLR 459 at 468.

¹³³ In *Hargrave v Le Breton* (1769) 4 Burr 2422.

¹³⁴ (1786) 1 TR 110.

Nevertheless, these policy considerations still had to be applied specifically in cases of judicial defamation. The first such was *R v Skinner*.¹³⁵ In this case, Skinner, a Justice of the Peace, was alleged to have said to a grand jury: "...you have disobeyed my commands; you are a seditious, scandalous, corrupt and perjured jury." Again, it was Lord Mansfield who gave the judgement of the court and who clarified the position of the law: "...neither party, witness, counsel, jury, or judge can be put to answer civilly or criminally for words spoken in office."¹³⁶

Thus, for the first time, the scope of privilege and – very important for the future – the groups of persons covered was specified. It became obvious that freedom of speech of all persons involved in court proceedings was paramount in order to secure an objective basis for the decision-making process.

3 2 3 *Habeas corpus*

The only general exception to the immunity of judges, in which there was no differentiation between judges of courts of record or not of record or between superior or inferior court judges, was of a statutory nature. According to s 9 of the Habeas Corpus Act of 1679, a judge had to pay £ 500 if he refused to hear the person detained and to grant a writ of *habeas corpus* in vacation time.¹³⁷ This provision clearly derives from the importance attached to the right of personal liberty from Edward I's reign onwards. However, it was never seen in the immediate context of judicial immunity. The majority of cases involving judges' liability related to false imprisonment. Although there is a rich flow of reports in regard to *habeas corpus*, liability under s 9 of the Act of 1679 has never been considered by an English court.¹³⁸

¹³⁵ 98 ER (1772) 529.

¹³⁶ *Ibid.* at 530.

¹³⁷ For more details as to the development of the writ of *habeas corpus* see Blackstone, *Commentaries*, vol.III 129-138; Holdsworth, *History*, vol.IX 108-125. For a discussion of mainly the American law in that regard see Olowofoyeku, *Suing Judges*, 60-63.

¹³⁸ *Ibid.* at 60 and *Pollock on Torts*, 84. As far as ascertained.

4 JUDICIAL LIABILITY IN MODERN ENGLISH LAW

4.1 Immunity from suit

Modern English law continues to grant judicial immunity from suit. A modern textbook states the general rule in the following bland terms:

“No action in tort lies against a judge or a magistrate for any *judicial act* done within his *jurisdiction* even though there may be evidence that he acted in bad faith.”¹³⁹

An examination of the modern defence of judicial immunity from suit thus needs to answer two questions: which acts fall within the scope of this immunity and what, if any, are the boundaries of immunity? First, however, it is essential to assess the scope of both the judicial act and judges’ jurisdiction. Both the question as to what constitutes a judicial act and the judges’ jurisdiction undoubtedly are those aspects most frequently referred to in modern English law of judicial liability.

4.1.1 The judicial act

English courts demarcated judicial and non-judicial acts by applying various parameters of definition. It is undoubtedly this use of different parameters for similar and related cases that has caused considerable confusion with regard to the content and extent of modern English law of judicial immunity from suit. Four main parameters, however, can be distinguished.

One classification of the actions of judicial officers has been to qualify them as simply non-judicial. This was the initial criterion of demarcation. As said elsewhere, Justices of the Peace were for centuries both judges and administrative officers and therefore it became increasingly important to differentiate between their administrative and judicial acts. It was thought desirable that the rules of immunity from suit be limited to cases which were clearly of judicial provenance since the liability of administrative officers is wider in scope than the liability of judicial officers.

¹³⁹ *Street on Torts*, 102. My italics.

A second classification is based on the distinguishing of judicial acts as judicial (discretionary) or as ministerial. A judicial act is one that involves the exercise of a discretion, in which something has to be heard and decided. Judicial acts therefore can also be defined as discretionary acts. A ministerial act is one which the law points out as necessary under the circumstances, without leaving any choice of alternative courses. Every purely formal step in a legal process is ministerial.¹⁴⁰ Ministerial acts are not covered by judicial immunity and thus liability can arise more easily.

A third classification draws on the elements of procedure within an act, be it judicial or non-judicial. While the first category referred to distinguishes between judicial and administrative acts, this one is commonly used to divide a *single* act into judicial or non-judicial segments. Scrutinising the various elements of proceedings reveals that by no means can all procedural elements of a single act be automatically identified as judicial. Some elements have merely a ministerial character. Theoretically, this observation should lead to a limitation of judicial immunity since only purely judicial acts are covered by immunity.

Finally, there is the classification of omission of office and acts outside judicial proceedings as non-judicial. This classification distinguishes between acts of judicial officers outside the scope of the judicial act as such. It also includes judicial acts which amount to omission of exercise of office. The above-mentioned classifications should be investigated in more detail:

4 1 1 1 *Non-judicial acts of judicial officers*

Generally speaking all judicial officers perform exclusively judicial acts. Thus no difficulties arise in determining whether a judge acted judicially or not. There are no cases reported in which superior court judges were held liable for ministerial acts done in their capacity as judges. This was not always so for judges of the lower courts. Numerous cases, particularly from the nineteenth century, show that Justices of the Peace were held liable for both judicial and ministerial acts. Today, however the situation is different. The few administrative functions performed by Justices of the Peace are well defined in the Justices of the Peace Act

¹⁴⁰ *Clerk and Lindsell on Torts*, 1475.

of 1979. Therefore it is not problematic to characterise their actions either as judicial or administrative.

4.1.1.2 Ministerial acts within judicial proceedings¹⁴¹

Even though it seems fairly easy to distinguish between judicial and administrative actions, it is necessary to draw a more refined distinction between the judicial and the ministerial elements of judicial actions. The definition in *Clerk and Lindsell*, namely that a judicial act is one that involves the exercise of a discretion whereas ministerial acts are those necessitated by law without choice of alternative courses, has been stated above.¹⁴² Examining the various stages of proceedings that one would generally describe as judicial, it becomes apparent that some significant aspects of judicial proceedings are in fact of a ministerial character. Consequently they would have to be identified as non-judicial acts and thus immunity from suit could not be conferred upon an officer for any misapplication of law in such cases. Rubinstein provides us with a striking example:

After an application for an order for execution has been made, a magistrate has the following tasks to perform: He has to a) issue a summons to appear (ministerial); b) conduct a hearing of the debtor and make decisions as to preliminary questions, i.e., as to the validity of the title for execution (judicial); c) after concluding that the title is valid, he has to issue the order of execution (ministerial); d) he has to take evidence and apportion costs (judicial).¹⁴³ Consequently, only misapplication of law with regard to b) and d) would be covered by judicial immunity.

This observation, however, has received scant recognition in the decisions of the English courts as to the scope of judicial immunity. Either this attention to detail is not paid, or ministerial acts are treated as being supportive of the judicial action as such, making the whole proceedings judicial.¹⁴⁴ With this in mind, it is obvious that the definition of a judicial act in English law is an extensive one.

¹⁴¹ The following passage combines aspects of both the second and third category referred to above.

¹⁴² *Clerk and Lindsell on Torts*, 476.

¹⁴³ Rubinstein, *Jurisdiction*, 19–20.

¹⁴⁴ Rubinstein, *Jurisdiction*, 154.

4 1 1 3 Judicial acts outside judicial proceedings

Judges of superior and inferior courts are protected as long as they act judicially. Failure to exercise an office is not considered a judicial act but a breach of ministerial duty. In the case of *Green v Hundred of Buccle Churches*, it was stated obiter that a Justice of the Peace acted in breach of his duty, however a ministerial and not a judicial duty, when he dealt idly with a request for relief.¹⁴⁵ The decision in *Ferguson v Kinnoull*, the only English case where a superior judge was ever held liable, went beyond even this. Not only inactivity but non-execution of a procedure required by statute, in this case to summon for trial, was considered a breach of a ministerial duty of the superior court judge.¹⁴⁶ Furthermore, judicial acts that are performed in advance or after or beyond the scope of proceedings and which have no reasonable connection with these are likewise not covered by judicial immunity from suit.¹⁴⁷

4 1 2 Want of jurisdiction

Once it has been established that a judge acted judicially, the only ground for a denial of immunity is want of jurisdiction.¹⁴⁸ The question of want of jurisdiction is, after all, essential to the determination of the boundaries of the immunity enjoyed by judges.

If want of jurisdiction can be proved by the plaintiff, the judge loses the cloak of authority. He is no longer a privileged official organ and can be held liable like any other citizen. This is in accordance with the rule of English law that:

“Every official, from the Prime Minister down to the a constable or a collector of taxes, is under the same responsibility for every act done *without legal justification* as any other citizen.”¹⁴⁹

Such acts are *coram non judice* and thus non-judicial and void. On the other hand we must take notice of Lord Bridge’s comments in *Re McC*, where he stated that:

“...[there] are many words in common usage in the law which have no precise or constant meaning. But few...have been used with so many different shades of meaning in different contexts or have so freely acquired new meanings with the development of the law as the word jurisdiction...”¹⁵⁰

¹⁴⁵ 74 ER 294 (1589).

¹⁴⁶ (1842) 9 Cl & F 251.

¹⁴⁷ *Law v Llewellyn* [1906] 1 KB 487; *Willis v Maclachlan* (1876) 1 Exch Div 376.

¹⁴⁸ Olowofoyeku, *Suing Judges*, 52.

¹⁴⁹ Rubinstein, *Jurisdiction*, 121. My italics.

¹⁵⁰ [1984] 3 WLR 1227 at 1232.

Nonetheless, one might try to shed some light on the matter if one is to accept that want of jurisdiction can be divided into two sub-aspects: absence of jurisdiction and excess of jurisdiction. The latter category again can be divided into another two sub-divisions: namely irregularities of procedure and misapplication of substantive law. Absence of jurisdiction applies when the act in question is not a judicial act at all, but a pure tort committed under the cloak of judicial authority. Excess of jurisdiction is not an honest exercise of judicial authority, although it remains within the authority given by the law.¹⁵¹

Thus, for anyone coming from a civil law background it is absolutely essential to understand that want of jurisdiction is nothing but a synonym for extreme error on the part of judges. Generally the meaning of jurisdiction is defined as follows:

“In the narrow and strict sense, the ‘jurisdiction’ of a...court connotes the limits...imposed...to hear and determine issues...by reference (i) to the subject-matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of the these factors.”¹⁵²

Notwithstanding this definition, it is important to bear in mind that jurisdiction in the context of judicial immunity is much *wider* than this definition. In this context, jurisdiction is not confined to questions of competence of the respective court, but includes all irregularities of procedure and even mistakes as to application of substantive law.¹⁵³

4 1 2 1 *Absence of jurisdiction*

Absence of jurisdiction can be assumed if the judicial officer acted without legitimacy from any source. These acts are null and *ex tunc* void. A void act needs to be distinguished from a voidable act. Voidable acts are also incorrect acts, but remain valid until they have been repealed by a higher court on appeal. Examples of absence of jurisdiction are a writ of execution issued by a clerk to whom authority was not delegated by the court¹⁵⁴; a testimony

¹⁵¹ *Clerk and Lindsell on Torts*, 1476-1477.

¹⁵² Olowofoyeku, *Suing Judges*, 53.

¹⁵³ This crucial point is rightly stressed by Wade and Forsyth, *Administrative Law*, 798; Kniffka, *Haftungsrechtliche Privilegierung*, 94-96. For details and reference to relevant case law see the sections right below.

¹⁵⁴ *Andrews v Marais* (1841) 1 QB 3.

under oath before a clerk without participation of a judge¹⁵⁵; or actions of a court unknown to English law or actions of usurpers of office.¹⁵⁶

On the other hand, deficiencies in the appointment procedure of judges no longer amount to absence of jurisdiction. A judge who acted judicially, although he was not appointed in a formally correct manner, becomes a *de facto* judge: "An officer *de facto* is one who has the reputation of being an officer he assumes to be, and yet is not a good officer in point of law."¹⁵⁷ Such a judge's decisions are accorded equal validity to those of a *de iure* judge.¹⁵⁸

Furthermore, bias on the part of a judge does not render his decision void and outside his jurisdiction but only subject to appeal. This seems to be the law since the decision in *Dimes v Grand Junction Canal* where the question arose whether a decree made by the Lord Chancellor himself could be set aside since it was alleged that he had a pecuniary interest in the case as a shareholder of the Grand Junction Canal Inc.¹⁵⁹ Consequently, no liability lies in the case of bias. This is affirmed by the decision in *Philipps v Eyre* where it was held by Willes J that:

"...as a rule, the judgement of an interested judge is voidable and liable to be set aside...but it is not absolutely void, and persons acting under such authority...would not be liable to be treated as trespassers."¹⁶⁰

This result is subject to criticism since it clearly breaches a tenet of natural justice. And in fact for many years the courts held that bias negated jurisdiction.¹⁶¹ The law was changed when it was accepted that waiver or consent could cure bias on the part of a judge and thus a remedy in form of appeal was believed to be sufficient.

4 1 2 2 *Excess of jurisdiction*

Excess of jurisdiction entails a somewhat reduced degree of faultiness. Irregularities of procedure can amount to excess of jurisdiction.

¹⁵⁵ *Candle v Seymour* (1841) 1 QB 889.

¹⁵⁶ *Rogers v Wood* (1831) 2 B & Ad 245.

¹⁵⁷ *R v Bedford Level Corporation* (1805) 6 East 356 at 369 *per* Lord Ellenborough CJ.

¹⁵⁸ However, early cases still identified this as outside jurisdiction, see *Hill v Barnes* (1777) 2 Black 1135; *Penney v Slade* (1839) 5 Bing NC 319; *Scadding v Lorant* (1851) 3 HLC 418; see for more details Rubinstein, *Jurisdiction*, 205 *et seq.*

¹⁵⁹ (1852) 3 HLC 329 at 341-344.

¹⁶⁰ *Philipps v Eyre* (1870) LR 6 QB 1 at 22.

¹⁶¹ "The law is wisely jealous on this head; and the slightest real interest in the issue of a suit *incapacitates* any one from acting as Judge in it." *Ex parte Medwin* (1853) 1 E & B at 609 *per* Lord Campbell.

It is of utmost importance, however, that irregularities alone are not sufficient for this purpose. Again, these irregular acts are mostly subject to judicial review but they are not necessarily void. Only gross irregularities render proceedings void and remove judicial immunity. Such irregularities include: defective composition of the Bench; certain defects as to jurisdiction of place, persons and subject-matter; and failure to observe the principles of a fair trial, notably public trial and breach of the *audi alteram partem* and *ne bis in idem* rules.

Defective composition of the Bench renders a decision null and void, the judges having acted outside their jurisdiction. According to Rubinstein, the law that laid down the rules as to the necessary quorum of a court was always strictly interpreted.¹⁶² The decision of a single magistrate where in fact a quorum of two was required was considered void.¹⁶³ In addition, a judge excluded by statute may also not sit in a case.¹⁶⁴ However, decisions made by an excessive number of members do not affect the resulting act: "If two may do it, *à multo fortiori*, four may do so."¹⁶⁵

Generally, deficiencies related to jurisdiction of the cause render a decision outside jurisdiction. As early as *The Case of the Marshalsea*, it was held that jurisdiction of the cause includes jurisdiction as to place, person and subject matter.¹⁶⁶ No problems arise in determining whether a judge acted within his jurisdiction in regard to place or person.¹⁶⁷ But problems may arise with regard to subject matter, since this jurisdiction is determined by the facts of the case. The questions raised are most perplexing since a balance must be struck between the need to contain certain tribunals within their limited jurisdiction and the postulate of power to decide and bind despite error.¹⁶⁸ The reason for the former is to prevent "...total

¹⁶² Rubinstein, *Jurisdiction*, 201.

¹⁶³ *Billings v Prinn* (1776) 2 Black 1017 and other cases cited at Rubinstein, *Jurisdiction*, 201. Note especially the South African decision of *R v Pillay* 1958 (4) SA 141 (T) where an order of a town council was void since one councillor had been absent from one of four meetings.

¹⁶⁴ *Serjant v Dale* (1877) 2 QB 558.

¹⁶⁵ *Creswick v Rooksby* (1613) 2 Bulst 47 at 49 *per* Flemming CJ.

¹⁶⁶ 77 ER 1027 (1613) at 1038.

¹⁶⁷ See the cases cited at Rubinstein, *Jurisdiction*, 208-211 and *Clerk and Lindsell on Torts*, 1483 fn58.

¹⁶⁸ For a detailed discussion of the various approaches to clarify this complex question see particularly Rubinstein, *Jurisdiction*, 211-219.

usurpations of powers by limited jurisdictions (inferior courts).”¹⁶⁹ On the other hand, if jurisdiction were to depend solely on the: “...correctness of his [the judge’s] inferences, the result would be that in all cases he would be liable for a mere erroneous exercise of his judgement.”¹⁷⁰

Since the scope of this work prohibits a more detailed account, it must suffice to state that the decision of an inferior court regarding the jurisdiction assigned to it by the law is conclusive, except in so far as an appeal may lie. The test is whether the case at issue relates to the “...general category of the subject-matter assigned by law to the court.”¹⁷¹ Only gross irregularities may render the decision void and thus give rise to an action against the judge.¹⁷²

A relatively recent case of excess of jurisdiction due to gross procedural irregularities is *R v Waltham JJ, ex parte Solanke* where the plaintiff was sent to jail by order of a magistrates’ court for continued failure to comply with a High Court order to make weekly payments for child support. The decision overlooked the crucial fact that the High Court’s order had never been registered at the magistrates’ court.¹⁷³ The justices were held liable for false imprisonment.¹⁷⁴

Furthermore, jurisdiction, although initially existent, may be lost through errors and irregularities in the course of proceedings. One would expect that failure to provide for a public hearing creates an abuse of jurisdiction. In fact this is not so. Again the distinction between voidable and void acts needs to be drawn. According to two decisions of the Privy Council, a breach of the open-court rule is solely voidable.¹⁷⁵ The Privy Council overruled an earlier case in which it was held that a judge breaking the open-court rule: “...demits his

¹⁶⁹ *Ibid.* at 211.

¹⁷⁰ *Clerk and Lindsell on Torts*, 1483.

¹⁷¹ Rubinstein, *Jurisdiction*, 218 and the leading cases quoted at 219.

¹⁷² *Clerk and Lindsell on Torts*, 1483 and the cases quoted at fn 60-62. For references to recent cases in this field, Rubinstein, *Jurisdiction*, 217. Furthermore see *Pease v Chaytor* (1863) 3 B & S 620 and *Lovesy v Stallard* (1874) 30 LT 792.

¹⁷³ [1986] 3 WLR 315.

¹⁷⁴ However, the damages were limited to one penny under s. 52 of the Justices of the Peace Act of 1979. See *R v Waltham JJ, ex parte Solanke* [1986] 3 WLR 315 at 319 (B)-(E).

¹⁷⁵ *McPherson v McPherson* [1936] AC 177 (PC) and *Stone v Stone* [1949] P 165.

capacity as a judge.”¹⁷⁶ As to breach of the *audi alteram partem* rule, the position of English courts since *Ferguson v Kinnoull* is such that this defect amounts to a breach of a ministerial duty.¹⁷⁷ Thus, judicial immunity is effectively removed or, rather, does not arise since it was not a judicial but a ministerial duty that was broken. Deficiencies as to the *ne bis in idem* rule will also remove a judge’s immunity. This was decided in *Creeps v Durden*.¹⁷⁸

Finally, jurisdiction may be wrongly assumed through error of law. This wrong assumption amounts to excess of jurisdiction if a court, albeit with jurisdiction to hear the case, deals with it inadequately.¹⁷⁹ For instance, if a magistrate applies a statute which has been repealed¹⁸⁰, or if costs are imposed without a legal basis¹⁸¹, or if a person is convicted in one case and punished in another.¹⁸² However, it seems that the courts are reluctant to spell out clearly what is mere irregularity and what amounts to excess of jurisdiction. In *Re McC* Lord Bridge stated:

“...once justices have duly entered upon summary trial of a matter within their jurisdiction, only something quite exceptional occurring in the course of their proceeding...can oust their jurisdiction...”¹⁸³

According to legal authorities, a distinction has to be drawn between the jurisdiction of a judge dependent on a precedent condition and that which is not. If a judge is required to establish a certain condition before imposing a sentence, non-compliance will amount to an excess of jurisdiction. Thus it was held in two fairly recent decisions that liability for false imprisonment lay when the respective magistrates failed to meet required conditions. A panel had the jurisdiction to impose a prison sentence on the sixteen year old plaintiff, but when the magistrate ignored the specific condition in Art 15 (1) of the Treatment of Offenders (Northern Ireland) Order of 1976 that the juvenile be informed of his right to legal aid, it was held that he stepped outside his jurisdiction.¹⁸⁴ In another case heard in 1988, the Manchester City Magistrates’ Court sent the plaintiff to jail after he defaulted on the rates for his business premises. According to s 103 of the General Rate Act of 1967, the court had to determine

¹⁷⁶ *Scott v Scott* [1917] AC 417 at 436 *per* Viscount Haldane LC.

¹⁷⁷ (1842) 9 Cl & F 251.

¹⁷⁸ (1777) 2 Cowp 240.

¹⁷⁹ *Clerk and Lindsell on Torts*, 1480.

¹⁸⁰ *Ward v Stevenson* (1844) 1 New Sess Cases 162.

¹⁸¹ *George v Chambers* (1843) 11 M & W 149.

¹⁸² *R v Brickhall* (1864) 33 LJMC 156; as well as *Willis v Maclachlan* (1876) 1 Exch Div 376; *Rogers v Jones* (1824) 3 B & C 409; and the cases referred to at Kniffka, *Haftungsrechtliche Privilegierung*, 106; *Clerk and Lindsell on Torts*, 1480.

¹⁸³ [1984] 3 WLR 1227 at 1242 and Kniffka, *Haftungsrechtliche Privilegierung*, 109.

whether the failure to pay was due to wilful refusal or culpable neglect. When the magistrates failed to do so, they rendered themselves outside jurisdiction.¹⁸⁵

If the judge does comply with any such precedent condition, it is argued that “...even ‘hopeless’ irregularity...” will not render the act outside jurisdiction.¹⁸⁶ It is doubtful whether gross and fundamental irregularities have to be assumed here. To an observer the differentiations seem almost arbitrary, despite the efforts of Lord Bridge to give an exact definition in *Re McC*: gross irregularities, said the judge, may be assumed if a magistrate absents himself from the hearing and gives judgement merely relying on hearsay from his colleague, or – similar to the above – if a judge breaks the rules of natural justice. Likewise if the irregularity is “...such as to strike at the very root of the judicial process rendering the trial little more than a ‘sham’.”¹⁸⁷

4 1 3 Statutory protection of Justices of the Peace

4 1 3 1 Liability

For historical reasons indicated above, the liability of Justices of the Peace was specifically regulated from as early as 1609 by statute, the Justices Protection Act, which was amended in 1751, 1803 and 1848. The 1609 Act has been repealed and replaced by the Justices of the Peace Act 1979.

Sections 44 to 52 of the Act preserved the distinction between magistrates and other judges by denying immunity to a magistrate in cases of malicious acts inside his jurisdiction and any acts outside his jurisdiction. Prior amendment by s 108 (2) Courts and Legal Services Act of 1990 (which will be discussed below) s 44 stated:

“If apart from this section any action lies against a justice of the peace for an act done by him in the execution of his duty as such a justice, with respect to any matter *within* his jurisdiction as such a

¹⁸⁴ *Re McC* [1984] 3 WLR 1227 at 1230 *et seq.*

¹⁸⁵ *R v Manchester City Magistrates' Court ex parte Davies* [1988] 3 WLR 1357.

¹⁸⁶ *Clerk and Lindsell on Torts*, 1482.

¹⁸⁷ *Ibid.* at 1483. See also Wade and Forsyth, *Administrative Law*, 798.

justice...(a) in the statement or particulars of claim it shall be expressly alleged that the act in question was done by a justice *maliciously* and *without reasonable and probable cause...*"¹⁸⁸

For acts outside jurisdiction s 45 stated:

"(1) This section applies - (a) to any act done by a justice of the peace in a matter in respect of which by law he does *not have* jurisdiction or in which he has *exceeded* his jurisdiction...
(2) Any person injured by an act to which this section applies may maintain an action against the justice *without* making any allegation in his statement or particulars of claim that the act complained of was done maliciously and without reasonable and probable cause."¹⁸⁹

The magistrates in the above mentioned cases of *Re McC* and *R v Manchester Magistrates' Court ex parte Davies* were all held liable under s 45 of the 1979 Act or under s 15 of the Magistrates' Courts (Northern Ireland) Act of 1964 which in its effect resembled that of the 1979 Act.¹⁹⁰

According to s 47 of the 1979 Act, where a statute grants discretionary power to a justice, no action may be brought against a justice by reason of the manner in which he exercises his discretion in the execution of his office. However, the Act will not protect a justice whose exercise of discretionary power is *ultra vires* or if he misused his discretion. Section 48 (2) of the Act provides that there shall be no action against any justice even if the order or the conviction was defective, as long as this order or conviction is affirmed on appeal.¹⁹¹

4 1 3 2 *Limitation on damages recoverable*

According to s 52, the damages recoverable by a plaintiff against a justice are limited in certain circumstances. These are: where the plaintiff was actually guilty of the offence of which he was convicted; or was liable at law to pay the sum he was ordered by the justice to pay; or was imprisoned and this imprisonment served as no greater punishment than that assigned by law for the offence.

¹⁸⁸ My italics.

¹⁸⁹ My italics.

¹⁹⁰ As has been affirmed by Lord Bridge in *Re McC* [1984] 3 WLR 1227 at 1237.

¹⁹¹ *Clerk and Lindsell on Torts*, 1489.

4 1 3 3 Indemnity

A distinctive feature of the liability of justices of the peace can be found in s 53. This section regulates the possibility of indemnity of a justice with regard to damages awarded against him in respect of anything done or omitted in the intended exercise of duty. A justice is entitled to indemnity if he acted reasonably and in good faith. This section deserves particular attention since it is the *only* regulation in the entire English law of judicial liability where the principle of personal liability of judicial officers is contravened. Lord Bridge in *Re McC* referred to this section as a provision "...transferring the financial burden of civil liability, in appropriate cases, from justices to the public purse."¹⁹² The burden is transferred to a local fund.

Any question as to whether a justice falls under the provisions of s 53 is determined by the magistrates' committee of the particular area. This concept of transferability of damages which had already been introduced to English law by the Administration of Justice Act of 1964 is of particular interest since this concept was unknown to common law. Yet common law is a system of law where solely personal liability of judicial officers was deemed an effective means of control against potential abuse on the part of judicial officers. In implementing this concept of indemnity, English law resembles the pertinent regulations of some continental civil law legal systems.¹⁹³

4 1 4 The application of want of jurisdiction by English courts during this century

How and whether the concept of want of jurisdiction has been applied by the English courts bears investigation, particularly in the second half of this century. As this division suggests, there have been quite different approaches over the past twenty-five years.

4 1 4 1 A new age: *Sirros v Moore*

Historically, the result of *The Case of the Marshalsea* was that want of jurisdiction was the only means of overcoming the immunity conferred on judges. Since it was held in *Fray v*

¹⁹² 3 WLR [1984] 1227 at 1236.

¹⁹³ Eg. Germany, France and Italy. See for a comparative study (Germany and France) Barth, *CWLR* 27 (1976-77) 72.

Blackburn and Ferrand v Garnett that superior court judges always had the power to determine their own jurisdiction, superior court judges were exempt from any liability with regard to judicial acts. As indicated above, inferior court judges could act outside their jurisdiction and hence could be held liable. Want of jurisdiction, therefore, had particular relevance to the inferior courts.

Whatever the merits of this historical distinction, in 1974 a majority in the Court of Appeal took the opportunity in *Sirros v Moore* to revamp the doctrine of judicial immunity and to expound the law in simpler terms.¹⁹⁴ Before the early 1970's, criticism of the law of judges' liability had increasingly been expressed by a number of authors. Their criticism focused on four particular aspects:

Firstly, that the distinction between courts of record and not of record has relevance nowadays only for the question of which courts can punish for contempt of court and which courts cannot.¹⁹⁵

Secondly, that the distinction between superior and inferior courts had become unclear and was, from a functional point of view, unnecessary since both kinds of courts performed similar functions. Since 1970, the Crown Court had been regarded as a superior court of record, though for practical purposes it was an inferior court for some types of jurisdiction; furthermore, its judicial personnel covered the whole range from puisne judges to lay justices.¹⁹⁶

Thirdly, that in a fully developed system of appeal procedures, including prerogative orders and orders of *habeas corpus*, the concept of personal liability of judges as an indirect means of redress is no longer as important as it was when judicial liability was practically the only remedy available to the parties.

Finally, in the light of the dogmatical development it was argued that:

¹⁹⁴ [1974] 3 WLR 459; Sadler, *MULR* 13 (1981-2), 514.

¹⁹⁵ Rubinstein, *TLJ* 15 (1964), 330; *Clerk and Lindsell on Torts*, 1463.

¹⁹⁶ See the text above at fn16 *et seq* and *Winfield and Jolowicz on Torts*, 640.

“As the law stands, liability is still founded on the nullity theory and hopelessly entangled with the vague distinction between ‘ministerial’ and ‘judicial’, ‘void’ and ‘voidable’, ‘want of jurisdiction’ and ‘wrong exercise of jurisdiction’.”¹⁹⁷

In *Sirros v Moore*, Lord Denning MR attempted to adjust the differences in respect of the scope of the immunity afforded to judges of the supreme court and to judges of the inferior courts.¹⁹⁸ He said:

“Whatever may have been the reason for this distinction, it is no longer valid...In this new age I would take my stand on this: as a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land...should be protected to the same degree.”¹⁹⁹

The distinction was held to be superfluous. Lord Denning was particularly critical of the fact that judges of superior courts were rendered totally immune as arbiters of their own jurisdiction. According to his judgement, it was incorrect to base immunity on this argument, which was relevant only to the internal relationship between the two groups of courts but should not impact on the question of judicial liability. For liability, the only relevant question was, first, whether a judge’s action was unlawful and, second, whether the judge knowingly acted unlawfully.²⁰⁰

Their Lordships applied this *bona fide* test to all judges including magistrates. Thus, the result of *Sirros v Moore* was twofold. On the one hand, superior court judges were deprived of total immunity. They became answerable under the condition of knowingly, that is consciously, acting outside their jurisdiction. On the other hand, the position of inferior court judges improved in that neither malicious acts within their jurisdiction nor *bona fide* acts outside their jurisdiction automatically destroyed their immunity. Notwithstanding these shifts, the question of whether a judge acted within or outside his jurisdiction remained important in determining the unlawfulness of the judicial act in question. However, emphasis now was added to a third element: even if the judge’s jurisdiction was wanting where he acted unlawfully, a plaintiff had to show that the judge has acted deliberately, that is intentionally.²⁰¹

¹⁹⁷ Rubinstein, *Jurisdiction*, 149.

¹⁹⁸ *Clerk and Lindsell on Torts*, 1478.

¹⁹⁹ *Sirros v Moore* 3 W.L.R. [1974] 459 at 470 (G).

²⁰⁰ *Ibid.* at (E).

²⁰¹ *Ibid.* at 471 (A): “...that he was not acting judicially, knowing that he had no jurisdiction to do it.” See further Kniffka, *Haftungsrechtliche Privilegierung*, 122 and Wade and Forsyth, *Administrative Law*, 797.

Consequently, English law came to rely on intentional conduct to destroy judicial immunity, albeit connected to the concept of want of jurisdiction.²⁰²

4 1 4 2 *The response: Re McC*

But the last word had not been spoken. Eleven years later, the House of Lords had the opportunity in *Re McC* to examine again the liability of inferior court judges, especially Justices of the Peace.

Their Lordships held that the sweeping judgement of Lord Denning and Ormrod LJ “...in favour of abolishing the distinction between superior and inferior courts in this respect cannot possibly be supported in relation to justices.”²⁰³ To their eyes it was clear that whatever the juridical base of this distinction, and however anachronistic it seemed to some, the language of the relevant statutes was clear. Sections 44 and 45 of the Justices of Peace Act of 1979 regulated beyond doubt that magistrates continued to be held liable for acts outside their jurisdiction.²⁰⁴ The judgement in *Sirros v Moore*, in so far as it related to judges of inferior courts other than Justices of the Peace was not expressly overruled by the House of Lords.

However, considerable confusion arises from the fact that their Lordships by no means concurred as to the general expediency of the rule that magistrates acting maliciously *within* their jurisdiction lost their immunity. As was conceded earlier by some critics, Lord Templeman and Lord Bridge indicated obiter that there was no need any longer in England to entertain the view of the justice “...reflected in Shakespeare’s plays, as an ignorant buffoon.”²⁰⁵ In the words of Lord Templeman: “Magistrates were better selected, better trained and better advised...”²⁰⁶ and thus “...the former cause of action against a magistrate acting within his jurisdiction is obsolete or obsolescent.”²⁰⁷ And Lord Bridge remarked that, in

²⁰² For critical remarks see *Street on Torts*, 103: “But is it justifiable to grant any judge immunity from the consequences of his mistakes - an immunity not shared by other professionals?”

²⁰³ 3 WLR [1984] 1227 at 1245 (H).

²⁰⁴ *Ibid.* at 1237 (G). Furthermore Wade and Forsyth, *Administrative Law*, 797.

²⁰⁵ 3 WLR [1984] 1227 at 1237 (A).

²⁰⁶ *Ibid.* at 1254 (B).

²⁰⁷ *Ibid.* at 1254 (A).

his opinion, the "...old common law 'action in the case, as for a tort' against justices acting within their jurisdiction maliciously and without reasonable and probable cause no longer lies."²⁰⁸

On the other hand, it is obvious from the judgement that their Lordships were at great pains to revamp the law, as is evident from Lord Bridge's judgement, i.e., where he stated obiter with regard to the situation of inferior courts other than magistrates' courts:²⁰⁹

"The narrower question whether other courts of limited jurisdiction can...be given the same immunity from suit...is one which I express no concluded opinion, though my inclination is to think that this distinction is so deeply rooted in our law that it certainly cannot be eradicated by the Court of Appeal and probably not by your Lordships' House...So fundamental a change would, in my present view, require appropriate legislation."²¹⁰

Similarly, Lord Templeman suggested obiter that the time was ripe for parliamentary review of the continued liability of magistrates.²¹¹ Opposing, Lord Keith and Lord Brandon expressed their doubts as to whether the old common law action against magistrates had in fact become obsolete. Their Lordships reserved their opinion on the issue.²¹²

Since *Re McC*, only two decisions concerning judicial liability have been reported. These are the decisions in *R v Waltham Forest JJ, ex parte Solanke*²¹³ and in *R v Manchester City Magistrates' Court, ex parte Davies*.²¹⁴ In these cases, the law as stated by the House of Lords in *Re McC* was applied.

The considerable degree of uncertainty about the civil liability of Justices of the Peace subsequent to the opinion expressed in *Sirros v Moore* and further (though obiter) in *Re McC* was removed in 1990 when Parliament took the matter to heart and legislated s 108 of the Courts and Legal Services Act. The said Act amended the relevant ss 44 and 45 Justices of the Peace Act of 1979 in that now no action lies for the acts of a justice/magistrate or his clerk while acting within his jurisdiction. In consequence, the way is now barred to a prospective

²⁰⁸ *Ibid.* at 1237 (D).

²⁰⁹ *Ibid.* at 1236 (E).

²¹⁰ *Ibid.* at 1246 (A). Furthermore *ibid.* at 1246 (B) and (G) *per* Lord Bridge and *ibid.* at 1253 (H) *per* Lord Templeman.

²¹¹ *Ibid.* at 1253 (F).

²¹² *Ibid.* at 1229 (H) *per* Lord Keith and *ibid.* at 1247 (H) *per* Lord Brandon.

²¹³ 3 WLR [1986] 315.

²¹⁴ [1988] All ER 930. See also (unreported) *CAR v Board of Visitors of Gartee Prison ex parte Sears* The Times March 20, 1986.

litigant in initiating an action against a magistrate on grounds of malicious behaviour while the magistrate is *within* his jurisdiction. Section 44 now reads:²¹⁵

“*No action* shall lie against any justice of the peace or justice’s clerk in respect of any act or omission of his...

(a) in the execution of his duty...

(i) as such a justice; or

(ii) as such a clerk exercising, by virtue of any statutory provision, any of the functions of a single justice; and

(b) with respect to any matter *within* his jurisdiction.”

Similarly, the Courts and Legal Services Act of 1990 amended s 45 of the Justices of the Peace Act of 1979 with respect to acts *outside* the magistrate’s (or his clerk’s) jurisdiction. As distinct from the law in its former state, the magistrate (or clerk) must not only be acting outside jurisdiction to evoke liability, but it must be proved that the magistrate (or clerk) acted with bad faith, i.e., maliciously. Section 45 now reads:²¹⁶

“*An action* shall lie against any justice of the peace or justice’s clerk in respect of any act or omission of his...

(a) in the purported execution of his duty...

(i) as such a justice; or

(ii) as such a clerk, exercising, by virtue of any statutory provision, any of the functions of a single justice; but

(b) with respect to a matter which is *not* within his jurisdiction, *if, but only if*, it is proved that he *acted in bad faith*.”

The requirement of malicious conduct and hence the harsh distinction between inferior and superior court judges that continuously governed the liability of inferior judges and more particularly of magistrates in the past appears to have faded away.²¹⁷ In fact, the law as it now stands represents precisely the situation envisaged by Lord Denning MR in 1974 in *Sirros v Moore*. With good reason, *Sirros* may thus be considered another of Lord Denning’s innovative judgements that created new law. Whether the solution he found should meet with unreserved approval, however, is an entirely different matter.²¹⁸

²¹⁵ Amended by s 108 (2) Courts and Legal Services Act of 1990. My italics.

²¹⁶ Subsequent amendment by s 108 (3) Courts and Legal Services Act of 1990. My italics.

²¹⁷ Accordingly the introduction of s 108 of the Courts and Legal Services Act of 1990 reverses the effect of the judgement in *R v Manchester City Magistrates’ Court, ex parte Davies* [1988] 3 WLR 1357.

²¹⁸ For criticism see below at 5.

4 2 Absolute privilege

The general rule as to the defence of absolute privilege in judicial proceedings in modern law²¹⁹ was stated by Lopes LJ in *Royal Aquarium v Perkinson*.

“The authorities establish beyond all question this: ...that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed.”²²⁰

If no significant exceptions to this general rule exist, it may be said to render judges absolutely immune in the true sense of the word. As has been indicated above, the scope of protection of absolute privilege in judicial proceedings is to be distinguished from the protection provided by immunity from suit. However, a number of decisions as well as statements by legal authors support what Olowofoyeku described as the ‘no distinction approach’. According to this approach there is no reason to distinguish between the two defences. Words uttered by a judge during proceedings, it is argued, must enjoy the same kind of privilege in English law as any other judicial act, and *vice versa*.²²¹ For the reasons that follow, this proposition appears to be incorrect. Four arguments may be raised against it.

4 2 1 The rationales of the defences

First of all the reasons for the protection offered by the two defences need to be distinguished. As already stated, freedom of communication in court is paramount with regard to absolute privilege, whereas immunity of suit focuses on the protection of judicial independence, thereby encouraging fearless and principled decision making, as well as recognising and protecting the finality of a court’s decision.

²¹⁹ Besides the cases that will be referred to in the text, the leading treatises with regard to absolute privilege in judicial proceedings are Olowofoyeku, *Suing Judges*, 125-141; *Gatley on Libel and Slander*, 158 *et seqq*; Carter-Ruck, *Libel and Slander*, 130 *et seqq*; *Salmond and Heuston on the Law of Torts*, 164 *et seqq*.

²²⁰ [1892] 1 QB 431 at 451.

²²¹ Furthermore see *Anderson v Gorie* [1895] 1 QB 668; *Scott v Stansfield* (1868) LR 3 Exch 220; *Haggart's Trustees v Lord President* (1824) 2 Shaw's Report 122 at 143; Sheridan, *MLR* 14 (1951), 276; Kniffka, *Haftungsrechtliche Privilegierung*, 25; Olowofoyeku, *Suing Judges*, 125.

Judicial proceedings and the decision-making processes aim to achieve an equitable and correct judgement, based on the facts and the statements of the parties, which result from intense interchange between judge, jurors, counsel, witnesses, etc. It is essential to assure freedom of communication in judicial proceedings so that the court can function “...uninfluenced by the fear of an action for defamation or a prosecution of libel.”²²² Or, as has been held by Channel J in *Bottomley v Brougham*:

“It is desirable that persons who occupy certain position as judges, as advocates, or as litigants should be perfectly free and independent, and to secure their independence, that their acts and words should not be brought before tribunals for inquiry...”²²³

4 2 2 Wider scope of absolute privilege

Absolute privilege protects not only judges but all parties involved in judicial proceedings. It covers parties²²⁴, witnesses²²⁵, counsel²²⁶ and solicitors.²²⁷ Thus, the ambit of the protection offered by the defence of absolute privilege is much wider than the protection of immunity from suit, which is confined to judicial and to some extent to quasi-judicial officers.²²⁸

4 2 3 No differentiation between superior and inferior courts of justice

A third reason why the ‘no distinction approach’ cannot be supported is that absolute privilege is enjoyed by inferior court and superior court judges alike. None of the peculiar differences in court hierarchies that we have had to dwell on so extensively under immunity from suit (and which to some, albeit limited, degree persist) has relevance for absolute privilege.²²⁹ Defamatory statements made in proceedings before any court are privileged, be it the House of

²²² *Kennedy v Hilliard* (1891) 10 Ir CLR 209 per Pigot CB; *Munster v Lamb* (1883) 11 QB 588 at 604-5 CA.

²²³ *Bottomley v Brougham* [1908] 1 KB 584 at 587.

²²⁴ *Gatley on Libel and Slander*, 167.

²²⁵ *Seaman v Netherclift* (1876) 2 CPD at 53 CA and *Gatley on Libel and Slander*, 164 *et seqq.*

²²⁶ *Munster v Lamb* (1883) 11 QB 588 CA and the cases cited at *Gatley on Libel and Slander*, 166-167.

²²⁷ *MacKay v Ford* (1860) 5 H & N 792.

²²⁸ Olowofoyeku, *Suing Judges*, 127.

²²⁹ For a different view see *Gatley on Libel and Slander*, 162-164 where it is submitted that the decision of *Sirros v Moore* has influenced not only the law on immunity from suit but also the position of absolute privilege; referred to also in *Street on Torts*, 448 fn4.

Lords, the Judicial Committee of the Privy Council, the Court of Appeal, the High Court of Justice, the Crown Court, county courts, courts of summary jurisdiction²³⁰, courts-martial²³¹ or a coroner's court.²³² In *Law v Llewellyn* it was expressly held that the Scottish law which in this respect provides for a distinction between superior and inferior courts has no validity in England.²³³

4 2 4 Irrelevance of motive

Finally, the extremity of absolute privilege is evident from the fact that, in opposition to the concept of immunity from suit, any distinctions as to deliberate or unconscious want of jurisdiction can be ignored. In *Munster v Lamb*, the Court of Appeal dissented from the view expressed by Lord Denman CJ in *Kendillon v Maltby* that: "...for words uttered in the course of his duty no magistrate is answerable...unless express malice and the absence of reasonable or probable cause is established."²³⁴

That this was the law was affirmed some nine years later by Lopes LJ who stated beyond doubt in *Royal Aquarium v Parkinson* that neither ill-will, anger, nor malice on the part of a judge making a defamatory statement would destroy his immunity.²³⁵ The reasons for this unequivocal position in law were summarised by Channel J in *Bottomley v Broughham*:²³⁶

"The real doctrine of what is called 'absolute privilege' is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual - I should rather call it a right for the public - the privilege is to be exempt from all inquiry as to malice; that he should not be liable to have his conduct inquired into to see whether it is malicious or not..."

²³⁰ *Street on Torts*, 447 and *Carter-Ruck, Libel and Slander*, 131.

²³¹ *Dawkins v Lord Rokeby* (1874) LR 8 QB 255, affirmed (1875) LR 7 HL 744.

²³² *Thomas v Churton* (1862) 2 B & S 475.

²³³ [1906] 1 KB 487.

²³⁴ 174 ER 562 at 566 *per* Lord Denman CJ.

²³⁵ *Royal Aquarium v Parkinson* (1892) 1 QB 431 at 451; see also *Anderson v Gorie* [1895] 1 QB at 668; *Scott v Stansfield* (1868) LR Exch Div 220.

²³⁶ [1908] 1 KB 584 at 587.

4 2 5 Exceptions: statements made outside the course of judicial proceedings

The only exception to absolute privilege emerges from the requirement that defamatory statements must have been uttered in the course of the administration of the law. The statements must be relevant to the case at hand. Statements on matters entirely unrelated to the case do not fall under this privilege.²³⁷ This exception is well in accord with the policy considerations underlying the defence: the protection of absolute privilege is lost if the specific circumstances of this privilege are non-existent.

5 CONCLUSION

Civil liability of judicial officers in English law can arise with regard to trespass to person, trespass to property and defamation. It is rightly therefore considered a liability in torts. Judicial officers' liability is, apart from one minor exception, personal liability. There exists neither vicarious nor primary liability of the Crown for wrongful acts committed by judicial officers.

Although no doubt exists as to the theoretical availability and necessity of civil judicial liability, in practice English law acknowledges an immunity from liability for judicial officers. Judicial officers' protection from suit is embedded in the law of torts by recognising the judicial context as a distinctive situation which needs to be covered by a peculiar privilege. It can be raised by a judicial officer against the other party's claim for damages. Two distinct defences are available to judicial officers: immunity from suit and absolute privilege in defamation. The degree of immunity afforded by the two defences varies slightly.

Within the general historical context of judicial liability, at least with respect to liability for wrong judgements, it is interesting to note that English law for many centuries entertained a number of absolutely distinct approaches.

²³⁷ *Munster v Lamb* (1883) 11 QB 588 at 605; *Hodgson v Scarlett* 106 ER 86 (1818) *per* Lord Ellenborough CJ and *per* Abbot J 89; *Kendillon v Maltby* 174 ER 562 at 566 *per* Lord Denman CJ.

On the one hand, English law provided the judges of the superior courts for all practical purposes with *de facto* total immunity from liability. The declared aim of this rigid immunity was to protect the dignity and the independence of the judiciary:

“If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction.”²³⁸

In this respect, English law exceeded considerably the development of judicial immunity from suit in France or in the Netherlands during the seventeenth and eighteenth centuries.

At the same time, however, judges in the English inferior courts, from the seventeenth century until 1974, were subject to rigid liability, a liability that bore comparison with the liability of judges in late Roman or medieval law. In cases of acts *outside* jurisdiction, English inferior court judges were held liable for any damage on grounds of the slightest negligence, that is *imprudentia*. The development of the liability of (local) inferior judges, therefore, stands in contrast to those developments, for instance in the Netherlands, where it was the condition of the lower judiciary that supplied the pressure for restricting the scope of liability. Whereas in the Netherlands the non-professionality of the local judges provoked the introduction of extended immunity, English law recognised a rigid form of liability as a necessary means to discipline the inferior judges especially because of their non-professionality. It is apparent that through the centuries English superior court judges knew in masterly fashion how to play, depending on the addressee, on the flute of protection of judicial independence or on the bass drum of the disciplining of their inferior brethren.

In modern English law of judicial immunity from suit, this discrepancy has ceased with the decision in *Sirros v Moore*.²³⁹ Today, judicial officers of all courts enjoy immunity from civil liability as long as they do not knowingly and deliberately overstep their jurisdiction. In this respect, the immunity of inferior court judges has been considerably extended. Due to the statutory provision of s 45 of the Justices of the Peace Act 1979 as amended by s 108 (3) Courts and Legal Services Act of 1990 this general rule now equally applies to magistrates acting outside their jurisdiction.

²³⁸ *Re McC* [1984] 3 WLR 1227 at 1236 *per* Lord Bridge.

²³⁹ This is stressed by *Clerk and Lindsell on Torts*, 1484; Wade and Forsyth, *Administrative Law*, 797.

Consequently it may be said that since 1974 even in modern English law the notion of intentional conduct has made its appearance. In this respect, English law and modern continental legal systems have grown closer together than one would expect. Particularly in view of the development of South African law of judicial liability, it is interesting to note that with the enactment of s 108 (2) Courts and Legal Services Act of 1990, finally English law has abolished malice in this regard as a decisive means of determining the border between immunity and liability.²⁴⁰

The concept of want of jurisdiction thus remains the most important distinction between English law of judicial liability and other legal systems. Want of jurisdiction must be considered unique although, when one studies it in detail, it becomes apparent that want of jurisdiction is nothing but the typically English answer to the essential question of defining the scope of judicial wrongdoing. The fact that the landmark decision in *Sirros v Moore* reduces, albeit marginally, the immunity of superior court judges may tempt us to believe erroneously that plaintiffs now have an easy route to sue for damages. Very rarely will a plaintiff be able to prove intention on the part of the judge. As in many other legal systems, judicial liability has become a question of leading sufficient evidence.

The historical analysis of the development of the English law of judicial liability outlined on the previous pages also provides some enlightenment as to the English influence on judicial liability in South African law. For reasons which will be elaborated on in more detail in the following chapter – reference is to the so-called *bellum juridicum* – it is obvious that if there is some common law influence it must have come exclusively from the course of development in England from the early nineteenth century until the 1920's or 1930's. However, the next chapter will show that the then existent (common law) concept of total immunity only rarely found its way into decisions in South African courts. English influences must, rather, be sought with regard to more general dogmatical concepts, for instance the concept of defences or the doctrine of malice, which both had enormous impact on South African law in general as well as on judicial liability in particular.

²⁴⁰ To speak with Olowofoyeku, *Suing Judges*, 58-59 "...malice may be relevant, not to establish liability by itself, but rather to rebut a claim of *bona fide* belief in jurisdiction, showing either a deliberate or reckless excess of jurisdiction." See also *Salmond and Heuston on Torts*, 20-21 on the distinction between intention and malice in the English law of torts.

Be that as it may, immunity from suit is not the only device available to a judge to defend himself in an action for civil liability. The defence of absolute privilege which can be raised by a judge in any action in defamation is intended to protect freedom of communication during court proceedings. This defence is much wider in scope than immunity from suit and covers not only all judges, regardless of whether they are inferior or superior court judges, but every one else involved in judicial proceedings. Unlike immunity from suit, any subjective questions as to knowledge of want of jurisdiction are of no relevance to the defence of absolute privilege.

Finally, it should be noted that in English law a plaintiff always could and still can institute any action against a judicial officer in tort without the need to obtain preliminary leave to sue from the court to which the judicial officer belongs or from any other court. Thus, English law does not recognise the need for a preliminary procedural safeguard, as in other countries, to prohibit misconceived and vexatious actions against judicial officers.²⁴¹

In the general context of judicial control and accountability, however, it appears that, by and large, modern English law does not recognise judicial liability as a powerful weapon in this regard. The control of inferior court judges today is, to a large extent, secured by appeal and prerogative orders, publicity of proceedings, the influence of the press, public opinion, and social and professional pressure of the Bar.²⁴² Shetreet in his excellent work *Judges on Trial* provides an abundant amount of material to show that both the Court of Appeal and the Queen's Bench Division play an important role in fulfilling a disciplinary function with regard to judicial misconduct particularly in the inferior courts.²⁴³ English jurists appear to accept more readily the notion of judicial control of this nature than they would call for the (more drastic) tool of judicial liability.²⁴⁴

²⁴¹ For example in South African law. See below at chapter VII 4.

²⁴² Shetreet provides for an extensive analysis of the pros and cons of the respective mechanisms in English law at *ibid.* at 161-267. See also Olowofoyeku, *Suing Judges*, at 142-145.

²⁴³ Shetreet, *Judges on Trial*, 201-224.

²⁴⁴ Although occasionally there is evidence of some kind of re-consideration particularly in fields which (admittedly only very superficially) appear to be not directly on the issue, i.e., with respect to costs of a new trial evoked by improper functioning of the courts. See for instance Shetreet's comments *ibid.* at 418-419.

"Are judges sufficiently accountable for their actions?
 ...Is the ultimate remedy of impeachment a sufficient
 practical and enforceable remedy to protect the public
 against an incompetent judge?
 ...How is the public to be protected from judges whose
 conduct does not justify impeachment but which is
 nevertheless rude, insensitive, sour, or otherwise
 sufficiently objectionable to leave the litigant gravely
 unhappy about his or her treatment?"

(The Hon I Mahomed *Chief Justice of the
 Supreme Court of Appeal of the Republic of
 South Africa*¹)

VII SOUTH AFRICAN LAW

1 THE POSITION AND STATUS OF JUDGES WITHIN THE SOUTH AFRICAN ADMINISTRATION OF JUSTICE

1 1 Developments from 1652 to 1910

1 1 1 The courts system

After the Dutch *Vereenigde Geoctroyeerde Oost-Indische Compagnie* (VOC) took possession of the Cape in 1652², the administration of justice and all executive and legislative functions were initially vested in the Council of Policy.³ In 1656, however, the Council decided to sit as a separate court of justice, which was to become the *Raad van Justitie*. In addition, a number of lower courts were introduced in the Cape, notably the *Collegie van Commissarissen van Kleine Zaken* (Court of Petty Cases) and, with the expansion of settlement from the 1680s onwards, the *landdroshowe* (colleges of *landdrosten en heemraden*) in the administrative

¹ Address at the first orientation course for new judges included in *SALJ* 115 (1998), 112.

² For detailed information on Dutch overseas settlements and the VOC see Devenish, *Cape of Good Hope*, 33; Hosten *et al*, *Introduction*, 339; Fisch, *Südafrika*, 53-89. See also Lademacher, *Niederlande*, 284-305.

³ The Council of Policy was in essence the same council vested by the so-called *artyckelbrief* with judicial and disciplinary authority at sea during the long voyages of the VOC's ships. For the early development of the administration of justice see Visagie, *Regspleging*, 40-41; Hahlo and Kahn, *Union*, 200-203; Devenish, *Cape of Good Hope*, 33-39; Van Zyl, *Geskiedenis*, 423-432; Sachs, *Justice in SA*, 17-31; Hosten *et al*, *Introduction*, 337-340.

districts.⁴ These local courts of first instance were modelled on the Dutch local courts of *baljuws*, *schepenen* and *mannen*.⁵

Apart from its inherent criminal jurisdiction, the *Raad van Justitie* functioned as a court of appeal for the inferior courts. Further appeal was not to the motherland, but first to the Council of Justice at Batavia and then to the Netherlands. Generally, the court's procedure was guided by the 1580 Instruction of Philip II on civil and criminal law.⁶ Reference was also made to the works on common procedural law in use in the Low Countries.⁷ Later, the so-called Statutes of India provided further detailed guidance.⁸ Proceedings were *inter alia* characterised by a prosecuting and co-judging *fiscaal*, the conducting of trials behind closed doors, the use of torture for confessions, the lack of precise rules of procedure, decisions without justification and publication, and judges of admitted partiality since corruption was endemic – a hair-raising legal scenario.⁹

With the seizure of the Cape by British troops to secure the shipping routes to India in 1795, at the height of the Napoleonic wars in Europe, the Council of Justice was reduced from 13 to 7 members.¹⁰ An additional local court of appeal consisting of the Governor and Lieutenant-Governor was established, from which further appeal lay to the Privy Council.¹¹

In 1802, in terms of Art 6 of the Treaty of Amiens, the Batavian Republic was restored, with full authority over the Dutch colonies.¹² The enlightened and idealistic lawyer J A De Mist (1749-1823) was appointed as Commissioner-General. He introduced reforms long overdue in the colony, since it was obvious "...in which sorry state justice and its administration had

⁴ For a detailed analysis of the early development of the lower courts see Botha, *Inferior Courts*, 101-117; Hahlo and Kahn, *Union*, 201; Van Zyl, *Geskiedenis*, 430.

⁵ See Venter, *Year Book for South African History* 3 (1940), 14 and 18.

⁶ We know that in 1734 a copy of the *Instructien van den Hofe van Holland* existed in the library of the Court of Justice. Botha, *Law Library*, 168; Hahlo and Kahn, *Union*, 202; Erasmus, *Interaction*, 147.

⁷ Writers such as J de Damhouder, P Merula, G van Wassenaar, S van Leeuwen and Gail. See Erasmus, *Interaction* at 145.

⁸ For more details on to the acceptance of the Statutes of India at the Cape see below at 4.2.2.

⁹ For critique see Theal, *Records of the Cape Colony*, vol. XXVIII 6 and Dolezalek, *Zivilprozessrecht*, 103. Further Fagan, *Historical Context*, 46; Hosten *et al*, *Introduction*, 346; Visagie, *Regspiegeling*, 41-55; Van Zyl, *Geskiedenis*, 432; Botha, *Punishment*, 284-291 and *Criminal Procedure*, 129-136.

¹⁰ *Ibid.* at 125.

¹¹ Hosten *et al*, *Introduction*, 347; Devenish, *Cape of Good Hope*, 51; Botha, *Criminal Procedure*, 125; Fine, *Cape Supreme Court*, 1; Hahlo and Kahn, *Union*, 201; Van Zyl, *Geskiedenis*, 445.

¹² For the following Batavian period see Hahlo and Kahn, *Union*, 203-4; Devenish, *Cape of Good Hope*, 51-52; Van Zyl, *Geskiedenis*, 446-448.

fallen...".¹³ In 1804, De Mist issued his *Provisioneele Instructie voor den Raad van Justitie aan de Kaap de Goede Hoop*, whereby the courts, with the exception of the Governor's Court of Appeal, continued in their function but were declared independent of the executive.¹⁴ For the first time, binding procedural rules were drawn up. Appeal from the lower courts lay to the Council of Justice and from there to the *Hoog Nationaal Gerechtshof* at The Hague.¹⁵ Unfortunately, De Mist's reforms were destined to be of short duration since the British repossessed the Cape in 1806.

Under the British, the structure of the colony's judiciary was not much changed until the introduction of the Charters of Justice in 1827 and 1832.¹⁶ The colony's highest court was again made the Governor's Court of Appeal.¹⁷ The Council of Justice consisted of seven members under a president, who became Chief Justice in 1812.¹⁸ Only in 1811 was a circuit court introduced. Civil procedure until 1827 remained essentially Roman-Dutch.¹⁹ Until 1813, proceedings continued to be carried out *in foribus clausis*.²⁰ The British government abandoned its policy of *laissez-faire* when the Cape was formally ceded to Britain in 1814, and a considerable stream of British settlers flowed into the colony from the 1820s. In 1823, a commission into the affairs of the colony was appointed. Amongst other things, the legal system at the Cape was investigated, and the commission's recommendations were largely implemented in a Charter of Justice which was issued in 1827 and modified in 1834.²¹

The Charters of Justice provided for truly fundamental changes in the administration of justice at the Cape and throughout South Africa that endure until today. Although Art 31 of the First Charter established unequivocally that Roman-Dutch law was to be retained as the law of the

¹³ See *Memorandum of Commissary JA de Mist*. Also Hahlo and Kahn, *Union*, 203.

¹⁴ Ordonnantie raakende het bestier der buiten-districten van 23 October 1805. For further details see Botha, *Inferior Courts*, 105.

¹⁵ Devenish, *Cape of Good Hope*, 51.

¹⁶ Hahlo and Kahn, *Union*, 203-204 and for the post-Charter period 208 *et seqq*; Devenish, *Cape of Good Hope*, 52 and 5361; Van Zyl, *Geskiedenis*, 443-452; Sachs, *Justice in SA*, 32-67; Fine, *Cape Supreme Court*, 3-28; Wessels, *History*, 363-366.

¹⁷ Farlam, 1988 *Consultus*, 36.

¹⁸ Johnstone, *1823 Commission*, 11.

¹⁹ Erasmus, *Interaction*, 145.

²⁰ Botha, *Influence of English Law*, 119-120.

²¹ For details on the Commission see generally the thesis by Johnstone, *1823 Commission*; Fine, *Cape Supreme Court*, 12-28; Taitz, *SALJ* 96 (1979), 470; Girvin, *Influence*, 186-194.

Colony²², the Charter of 1827 undoubtedly laid the foundation for the lasting and constantly growing influence of English common law. The old Council of Justice was replaced by a unitary Supreme Court. However, due to the general adoption of Roman-Dutch law, neither a Court of Chancery nor Chancery jurisdiction were established at the Cape. Roman-Dutch law, unlike English common law, has never recognised the existence of the two separate judicial systems.

The organisation, hierarchy and staffing of the courts, as well as the recruitment of the future Bar and Side-Bar, in other words the whole administration of justice, was revamped on English lines. Fundamental features of common law proceedings were introduced, particularly the central role of the litigating parties during the trial, the neutrality of the court, the adversarial character of the system, public hearings, orality, immediacy of the proceedings and, finally, publication of sentence and the reasons for it.²³ The doctrine of *stare decisis* was established.²⁴ The style of appeal proceedings was changed. Judgements tended to be individualistic; dissenting opinions became a common feature of court decisions. On all counts, there was a dramatic break with the former Roman-Dutch (Roman-canonical) procedure, which had become totally anachronistic.²⁵

The Supreme Court consisted of a Chief Justice and three puisne judges. A new feature was the introduction of juries in criminal²⁶ and civil²⁷ cases, as well as a circuit court which was held twice a year. The *landdrost* was abolished, and resident magistrates as courts of first instance were installed instead. The rapid expansion of the Cape Colony in the nineteenth century resulted in the founding of two superior courts in more remote areas.²⁸ In 1864, the

²² Foster and Tennant, *Statutes*, 1 *et seq.* This was a political decision by the English government. See Theal, *Records of the Cape Colony*, vol. XXXII 255 *et seq.*; Zimmermann, *Römisch-holländisches Recht in Südafrika*, 11; De Vos, *Regsgeskiedenis*, 247. Since *Campbell v Hall* (1774) 98 ER 1045 at 1047 it was held that "...the laws of a conquered country continue in force, until they are altered by the conqueror." *per* Lord Mansfield. See also Art 7 of the Capitulation signed at Rustenburg in September 1795 which stated that colonists were to "...retain all the privileges which they now enjoy...".

²³ Erasmus, *SALJ* 108 (1991) I, 265; Jacob, *Civil Procedure since 1800*, 205. On the history of law reporting see Hahlo and Kahn, *Legal System*, 240 and 282-301; Fine, *Cape Supreme Court*, 99-100, 299-302 and 344-346.

²⁴ Erasmus, *Interaction*, 150 fn68 with further references.

²⁵ Erasmus, *SALJ* 108 (1991) I, 275. For the Roman-Dutch law of procedure see generally Dolezalek, *Zivilprozessrecht*, 59-104. For an introduction to Roman-canonical procedural law see Engelmann, *Continental Civil Procedure*, 455 *et seq.*

²⁶ See Fine, *Cape Supreme Court*, 33-41.

²⁷ Act No 7 of 1854.

²⁸ For details see Fine, *Cape Supreme Court*, 223-60 and 305-325.

Eastern Districts Court (EDC) was inaugurated at Grahamstown and, in 1880, the High Court of Griqualand (HCG) was established at Kimberley.²⁹ From 1879, even a separate Court of Appeal was created for the colony, but this proved too expensive and was abolished in 1886.³⁰

It must be noted in passing that, besides the considerable changes in the administration of justice, legislation was passed that profoundly changed the law of evidence³¹, inheritance and succession³² and marriage.³³ Furthermore, growing trade relations with the (new) motherland brought new enactments in company law³⁴, mercantile law³⁵ and insolvency law.³⁶ Most of these statutes were enacted at the Cape in virtually identical form to their English predecessors and are evidence of the British policy of gradualism in reforming the legal sphere.³⁷

In Natal, although the area is said to be "... in sentiment and composition the most English of the provinces up to this day..."³⁸, the first courts were introduced in 1838 by the Voortrekkers.³⁹ This interlude came to an end in 1843 when the British annexed Natal and incorporated it into the Cape as a separate district. A District Court was created⁴⁰, consisting, in civil cases, of a recorder; criminal cases were tried by a jury of nine. In 1857, after representative government was conferred on Natal, the District Court was replaced by a Supreme Court.⁴¹ This court was composed of the Chief Justice and two puisne judges. Furthermore, a circuit court and inferior magistrates courts based on the Cape model were introduced. Distinct from the Cape, however, was the separate court system for disputes solely

²⁹ Fine, *Cape Supreme Court*, 223 *et seqq.* and 321 *et seqq.*; Girvin, *Architects*, 96.

³⁰ *Ibid.* as well as Fine, *Cape Supreme Court*, 332-337.

³¹ Ordinance No 72 of 1830.

³² Ordinance No 104 of 1833; Ordinance No 15 of 1845; Inheritance Law Act No 26 of 1873; Succession Act No 23 of 1874.

³³ Cape Marriage Order in Council 7 Sept 1838.

³⁴ Joint Stock Companies Limited Act No 23 of 1861 and Companies Act No 25 of 1892.

³⁵ Merchant Shipping Act No 13 of 1855 and General Law Amendment Act No 8 of 1879.

³⁶ Ordinance No 64 of 1829 and Ordinance No 6 of 1843.

³⁷ Generally Hahlo and Kahn, *Union*, 8-20; Van Zyl, *Geskiedenis*, 455-457; Devenish, *Cape of Good Hope*, 56 refers to an osmosis which offered the greatest threat to Roman-Dutch law.

³⁸ Hahlo and Kahn, *Union*, 24.

³⁹ On the Great Trek see Wilson, *History of South Africa*, vol.1 302-310; Thompson, *History*, 87-96; Davenport, *South Africa*, 38-40 and 57-60.

⁴⁰ On the administration of justice in Natal see at Hahlo and Kahn, *Union*, 220-226; Roberts, Natal, 79-90; Spiller, *District and Supreme Courts of Natal*, as well as his *Natal Supreme Court*.

⁴¹ Law No 10 of 1857. See at Cadiz and Lyon, *Natal Ordinances*.

between Africans.⁴² Ordinance 12 of 1845 established Roman-Dutch law as the law of the Colony of Natal. Procedural rules, too, were initially taken over from the Cape.⁴³ However, in later years, amendments to procedural rules were drawn predominantly from England.⁴⁴

Prior to independence in 1854, the judiciary in the area that is known today as the Free State was that of an undeveloped community.⁴⁵ In 1854, a circuit high court of three *landdrosten* became the highest court of the new Republic. Courts of first instance were the *landdrosten* for minor cases and the courts of the *landdrost* and two *heemraden* for more important cases.⁴⁶ From 1875 to the end of the Anglo-Boer War, criminal and civil appeals from the lower courts were heard by a Supreme Court consisting of a Chief Justice and two puisne judges. This court sat at Bloemfontein.⁴⁷ Procedural law was mainly based on the English model introduced at the Cape in 1827.⁴⁸ Dutch was the only official language used in court.⁴⁹

After the founding of the *Zuid-Afrikaanse Republiek* (ZAR) in 1858, a Constitution (*Grondwet*) provided for the establishment of a rudimentary court system of a higher court of three *landdrosten* in civil and twelve jurors in criminal cases. As courts of first instance, courts of *landdrosten* were established in each district.⁵⁰ In 1877, it was decided that the traditional court system be reformed. The highest court of the Republic was to be a High Court consisting of three judges. In addition, a circuit court was established, and the courts of *landdrosten* administered the law in the districts.⁵¹ In 1864 and 1874, procedural laws were enacted where, again, the influence of the Cape procedural rules is evident.⁵² However, the

⁴² See Spiller, *District and Supreme Courts of Natal*, 2-7.

⁴³ See ss 20-38 Ordinance No 14 of 1845 and ss 25-60 Law No 10 of 1857.

⁴⁴ See Hahlo and Kahn, *Union*, 224 for further details.

⁴⁵ On the development in the *Vrystaat* see Hahlo and Kahn, *Union*, 226-8 and 240-247; Sachs, *Justice in SA*, 71-76; Oloefse, *Orange Free State*, 65.

⁴⁶ Hahlo and Kahn, *Union*, 241.

⁴⁷ Oelofse, *Orange Free State*, 66-73, Van Zyl, *Geskiedenis*, 463-465; Hahlo and Kahn, *Union*, 242-244.

⁴⁸ Manier van Procederen in Crimineele Zaken 20 June 1856; Lagere Hoven - Manier van Procederen 1 November 1856 and Rondgande Geregthoven in Civiele Zaken - Manier van Procederen 1 March 1858. Van Zyl, *Geskiedenis*, 462; Hahlo and Kahn, *Union*, 244. Ordinance No 6 of 1856, which regulated the law of evidence, for instance, was a direct translation of the 1830 Cape enactment.

⁴⁹ Ordinance No 3 of 1854.

⁵⁰ See Art 127-131 Grondwet for more details. Included in Kotzé, *Locale Wetten ZAR*, see also by Kotzé *SALJ* 36 (1919), 130 *et seq.*

⁵¹ See *ibid.* and Art 29-32 Bijlage Grondwet (1877).

⁵² Ordinance No 5 of 1864 and Ordinance No 1 of 1874. See also Hahlo and Kahn, *Union*, 230.

1877 reforms came too late since Britain annexed the ZAR for four years.⁵³ After independence in 1881, a High Court sat at Pretoria with full appellate jurisdiction. Johannesburg had to be content with a circuit court.⁵⁴

After the Anglo-Boer War of 1899-1902, the Boer Republics were relegated to the status of Crown colonies. In 1906-1907, however, the Orange River and Transvaal colonies were granted responsible government. Two newly created Supreme Courts obtained general appellate and review jurisdiction over the colonies.⁵⁵ Johannesburg in the Transvaal was assigned a High Court. The courts of *landdrosten* were abolished once and for all and replaced by resident magistrates' courts.

1 1 2 Institutional aspects

1 1 2 1 Independence of the judiciary

Under the rule of the VOC, judges were not independent of the other branches of the *trias politica* since the majority of judges also sat on the Council of Policy, the highest executive body of the settlement. Nor were they distinct from the legislature since the same Council performed legislative functions.⁵⁶ Until 1732, the Governor was Chairman of the Council of Policy and President of the Court of Justice. In 1732, the *heeren seventien*, the supreme directorate of the VOC, decided that the Governors of the *buitencomptoiren* (outposts) be excluded from participation in the administration of justice.⁵⁷ Accordingly, in 1734, the *secunde* (Vice-Governor) nominally took over the chair of the *Raad van Justisie* as President

⁵³ The objective was to prove that the ZAR was in a position to administer the country properly and that foreign (British) intervention was thus unnecessary. See Kotzé, *SALJ* 36 (1919), 135 for details.

⁵⁴ Hahlo and Kahn, *Union*, 235.

⁵⁵ Orange River Colony Ordinances No 4 and 7 of 1902 included in Lefebvre and Jackson, *Statutes of the ORC*. For more details see Hahlo and Kahn, *Union*, 238.

⁵⁶ Sachs, *Justice in SA*, 17; Devenish, *Cape of Good Hope*, 39; Davenport, *South Africa*, 18; Thompson, *History*, 41.

⁵⁷ The *heeren seventien* was the highest administrative body of the VOC. The *buitencomptoiren* were all trade posts subordinate to Batavia (Jakarta, Indonesia), the capital of the Dutch East Indies.

of the Court.⁵⁸ Further, the *fiscaal*, who was *inter alia* responsible as state prosecutor, also sat on the Bench as a judge.⁵⁹

During the first British occupation the situation improved marginally. Even though Governor Earl Macartney was to take "...especial care that in all Courts established within the settlement Justice be impartially administered..."⁶⁰, he and the Lieutenant-Governor constituted the newly created local appeal court. Only the enlightened reforms of De Mist introduced separation of powers in the Cape. In terms of Art 66 of the Provisioneele Instructie, the *onafhangelijkheit* of the High Court was well protected⁶¹ and, according to Art 45 and 46, the Governor did not have the right to control the administration of justice.⁶² Nonetheless, after the second British occupation, the Governor returned as the President of the Appeal Court and the *fiscaal* reassumed his seat on the Bench next to the Chief Justice.⁶³

These anomalies were resolved only by the Charters of Justice.⁶⁴ From then on, the British colonial judiciary at the Cape, and later in Natal, became truly independent.⁶⁵ It is worth noting that the Chief Justice of the Cape Colony was made *ex officio* President of the Legislative Council from 1854 to 1910, when the Cape was granted representative government.⁶⁶ On the other hand, the dawn of English legal influence brought the principle of parliamentary supremacy first to the British colonies and, later, to the Republic of South Africa. As shown earlier, the historical origins of this constitutional principle lay in England

⁵⁸ Visagie, *Regspleging*, 43; Hahlo and Kahn, *Union*, 200; Van Zyl, *Geskiedenis*, 429.

⁵⁹ Devenish, *Cape of Good Hope*, 39.

⁶⁰ According to Art 10 of the Instructions to the British Governor of 1797 quoted from Visagie, *Regspleging*, 92.

⁶¹ Proclaimed on 1 March 1803. Article 66 states: "*De Raad zal zich in dezelfs deliberatien, vonnissen of besluiten, door geene andere Autoriteit hoegenaamd mogen laten influenceeren, maar als Rechterlyke Magt volkomen onafhangelijk zyn.*"

⁶² Visagie, *Regspleging*, 103. According to Van der Merwe, *Die Kaap onder die Bataafse Republiek*, 365 the Political Council of the Colony appeared to be unhappy with the far reaching provisions in favour of judicial independence.

⁶³ Bird, *The State of the Cape of Good Hope in 1822* as quoted by Botha, *Public Prosecutor*, 142 rightly observed: "What acute feelings must this create in the mind of the unhappy individual who, whilst trembling for his life, perceives the adversary at the ear of the judge."

⁶⁴ Apart from other things, issues were the membership of the Chief Justice in the Council of Advice, patronage over minor officers of court, language ability of jurors. For details see Fine, *Cape Supreme Court*, 413-416.

⁶⁵ With regard to Natal see ss 1-9 Ordinance No 14 of 1845 and sections 8-10 Law No 10 of 1857.

⁶⁶ The Legislative Council was a council of 15 members. With the Governor and the House of Assembly, it formed the Cape Parliament. The Legislative Council thus resembled the House of Lords and the President's office that of the Lord Chancellor. See at Girvin, *Architects*, 120 fn141 for more details.

and this principle restricted the courts' right to test the legality of legislative measures.⁶⁷ In this important aspect, the South African judiciary from an early stage was subject to the authority of Parliament.⁶⁸

The early development of the judiciary in the two Boer republics shows that separation of powers was not observed. *Landdrosten* constantly performed both executive and judicial functions. Furthermore, in the ZAR, Art 165 of the Grondwet regulated initially that all courts prior to giving judgement, be it criminal or civil, had to enquire of the Executive Council whether the sentence should be reduced or even set aside. One might be tempted to think that these state organs acted as a court of equity. In reality, the early judges in the ZAR were mere puppets. In the *Oranje Vrystaat*, the situation improved only after the judiciary became formally independent with the establishment of the Supreme Court. Unlike the British colonies, the *Vrystaat* granted the judiciary, as an inherent feature of the Constitution, the right to review legislation. This right, however, was exercised only once.⁶⁹

In the ZAR, the judiciary's testing right was described some years later by President Kruger as a 'principle of the Devil'. These words were the final straw in South Africa's first constitutional crisis (1897-1899), which revealed the extent to which judicial independence existed in the ZAR. Kruger dismissed Chief Justice Kotzé, who had refused to consent to the explicit abolition of the judiciary's testing right which had been legislated in 1897 after the High Court had declared some informal laws or *besluiten* invalid since their enactment collided with the Grondwet.⁷⁰

1 1 2 2 *Appointment and tenure*

In the early days of the Dutch *Raad van Justitie*, the appointment process lay *de facto* in the hands of the Governor, subject to the approval of the *heeren seventien*.⁷¹ During the first British occupation and after the second annexation until 1828, members of the court were

⁶⁷ See the text above at chapter VI 1 at fn 11.

⁶⁸ Dugard, *Human Rights*, 14 and 16-18 and below at 1 2 2 1.

⁶⁹ *Cassim and Solomon v The State* (1892) CLJ 58. See particularly Thompson, 1954 BSALR, 51-57; Sachs, *Justice in SA*, 74 and Oelofse, *Orange Free State*, 73.

⁷⁰ See *Brown v Leyds* NO 1897 OR 17 and Wet No 1 van 1897. For more details on the constitutional crisis in the final days of the ZAR see Tindall, *Introductory Note to Kotzé's Memoirs*, ix and xi-xliv; Dugard, *Human Rights*, 14 and 21-25; Kahn, SALJ 75 (1958) 410 *et seqq*; Girvin, *Architects*, 127 with further references.

⁷¹ Only members of the Dutch Reformed Church were eligible. Lutherans or Catholics were excluded for many years.

appointed solely by the Governor and held office *durante bene placito* (at his pleasure only). At the time, this was markedly different from the situation in England after the Act of Settlement of 1701.⁷² It was again De Mist who came forward with strikingly modern proposals that in a sense anticipated appointment procedures introduced into South Africa under the present Constitution, some 193 years later. De Mist proposed that the president of the *Raad van Justitie* hold permanent office, and that three of the remaining six members of the court be appointed by the state government from a list of nominees submitted by the Colonial Office. The other three members were to be chosen from the most prominent and able colonists.⁷³

With the introduction of the First Charter of Justice in 1827, the five judges of the Cape Supreme Court and, later, of the Natal Supreme Court, were to be appointed by the Crown.⁷⁴ All judges now held office *quamdiu se bene gesserint* (on good behaviour).⁷⁵ In the *Oranje Vrystaat*, judges were appointed by the President after consultation with the Executive Council. The appointment process in the ZAR appears to have been somewhat vague.⁷⁶ From 1902, judges in the former Boer republics were appointed by the Governor and later by the Governor-in-Council.⁷⁷

1 1 2 3 Threat of removal and disciplinary action

Under the rule of the VOC, the *fiscaal* wielded enormous power as it was up to him to initiate disciplinary action against members of the judiciary.⁷⁸ There appear to have been no precise rules as to disciplinary action, and constant rivalry and envy led to abuse. During the Batavian interlude, a procedure was introduced which was designed to ensure objectivity. According to Art 25 of De Mist's Provisioneele Instructie, any charge against an official was to be

⁷² Visagie, *Regspiegeling*, 92; Van Zyl, *Geskiedenis*, 445. And see above at chapter VI 1 2 2.

⁷³ De Wet, *THR-HR* 7 (1944), 28.

⁷⁴ Article 3 Charter of Justice; Botha, *SALJ* 18 (1901), 136. For Natal see ss 3 and 4 Ordinance No 14 of 1845 and s 10 Law No 10 of 1857.

⁷⁵ *Ibid*; see also Art 5 First and Second Charter of Justice.

⁷⁶ See Art 117 Grondwet (1889) and Art 140 Grondwet (1896). Another interesting historical note surrounds the appointment of Kotzé in 1877 by President Burger, who thought that this was within his sphere of action. However, the appointment was suspended by the Executive Council owing to procedural errors. With regard to the *Oranje Vrystaat*, see Art 5 and 7 Wet betreffende de Hoogere Gerechtshoven in *Wetboek van den Oranjevrijstaat*, 21.

⁷⁷ See ss 1 and 6 Ordinance No 4 of 1902 for the Orange River Colony and ss 2 and 3 Proclamation No 14 of 1902 for the Colony of Transvaal in *Statute Law of the Transvaal 1839-1910*.

⁷⁸ A detailed overview of the tasks of the fiscal's office before 1828 is provided by Botha, *Public Prosecutor*, 139-145.

prosecuted by the Public Prosecutor before the *Raad van Justitie* until the case was ready for judgement. The record was then sealed and sent for final decision to the motherland.⁷⁹

Later, under the Charters, the British Governor was empowered to suspend any judge on proof of misconduct, but only on advice of a majority of the members of the Executive Council.⁸⁰ Further, he had to report any such case immediately to the monarch, who had the ultimate discretion as to whether to disallow or to confirm that suspension.⁸¹ This procedure also applied in Natal after 1845.⁸² It is interesting that a number of investigations concerning nineteenth century Cape⁸³ and Natal⁸⁴ judges were conducted. In the *Vrystaat*, the President was empowered to suspend judges. Permanent dismissal required a vote by the *Volksraad* after an inquiry into the matter at the request of the Executive Council.⁸⁵ For decades, judges in the *ZAR* held office with no clear rules as to dismissal and disciplinary proceedings.⁸⁶ After the Anglo-Boer War, judges could be dismissed by the Governor on alleged misbehaviour or incapacity after an address to both houses of Parliament.

1 1 3 Professionalism and legal education of judges

Unlike their brethren in the superior courts in the Netherlands, the judges of the early *Raad van Justitie* were laymen, completely untrained in substantive and procedural law.⁸⁷ Until 1739, the *Raad van Justitie* had access only to a small law library consisting of ten books.⁸⁸ A compilation of local statutes was not available. Local statutes were promulgated only by

⁷⁹ Article 97 Provisioneele Instructie voor den Raad van Justitie aan de Kaap de Goede Hoop van 1804.

⁸⁰ Article 5 First and Second Charter of Justice.

⁸¹ Article 6 First and Second Charter of Justice.

⁸² Section 7 Ordinance 14 of 1845.

⁸³ Investigations into judges' conduct were made with regard to Sir John Wylde (1831), Andries Stockentröm (1875) and James FitzPatrick (1878). For details see Fine, *Cape Supreme Court*, 530, 518 and 479. With respect to Wylde see also Girvin, *Architects*, 97 and *SALJ* 109 (1992), 655. With regard to FitzPatrick see Girvin, *Influence*, 282-284.

⁸⁴ For a detailed account of the proceedings against judge Cloete see Spiller, *District and Supreme Courts of Natal*, 23-26; Fine, *Cape Supreme Court*, 458. Judge Cloete was accused of having allowed private feelings to interfere with impartial administration of justice, particularly in the case of *Meller v Buchanan*.

⁸⁵ Article 7 Wet betreffende de Hoogere Gerechtshoven. See also Hahlo and Kahn, *Union*, 243.

⁸⁶ According to Wet No 3 van 1877 it was proposed that precise rules on the dismissal of judges be drafted. However, this statute was never passed.

⁸⁷ Wilson, *History of South Africa*, 221.

⁸⁸ Devenish, *Cape of Good Hope*, 39. See further Botha, *Law Library*, 160.

public declamation at the Cape Town castle and on Sundays during church service.⁸⁹ Furthermore, it was not clear to the judges which other statutory enactments had validity at the Cape. For example, confusion surrounded the question of whether the Statutes of India were to be applied by the *Raad*. Only in 1715 was this uncertainty cleared, albeit in a substantially incorrect manner.⁹⁰ Not surprisingly the first British Governor, Macartney, reported in 1797:

“The supreme judges, however, are not civilians nor professional lawyers. The forms of the court are in other respects faulty and in some instances their decisions are supposed to have had a partial bias...”⁹¹

The standard of professionalism and legal education of the judges at the Cape before the Charters of Justice was unimpressive, and judges were drawn from the ranks of various non-legal professions or the civil service.⁹² Failure to give reasons for judgements, endless delays, and some degree of nepotism were endemic, and many judges were appointed simply to increase their emoluments.⁹³ Only from 1815 onwards were legally trained men increasingly appointed to the Bench. By 1827, three judges held a doctor's degree in law.⁹⁴ However, the Governor, as judge of the Appeal Court, was without any legal training.⁹⁵ In civil cases he even sat without assessors. Sir Richard Plasket, Colonial Secretary from 1825, reported: “The Colony is at its lowest ebb...[t]he Court of Justice is perhaps the worst.”⁹⁶

After the introduction of the Charters of Justice, the Cape judiciary was finally raised to the same standard as that of the judiciary in other Commonwealth legal systems. The Supreme Court was to consist of judges who had to be barristers in England, Ireland or Scotland of not less than three years standing.⁹⁷ Appointments to the Bench were made mostly from the three United Kingdom Bars. After 1873, however, appointments were also made from the ranks of local advocates. It is worth noting that the legal training and background of the judges at the Cape in the nineteenth century had a significant influence on the shaping of what we today consider South African law. Not only by direct statutory enactment, as indicated above, but also by somewhat covert and indirect means, a considerable part of English law was received at the Cape.

⁸⁹ Sachs, *Justice in SA*, 18.

⁹⁰ See below at 4.2.2.

⁹¹ Theal, *Records of the Cape Colony*, vol.IV 115.

⁹² Farlam, 1988 *Consultus*, 36.

⁹³ Johnstone, 1823 *Commission*, 13; Hahlo and Kahn, *Union*, 205.

⁹⁴ Sir John Truter, W Bentink and J H Neethling. See Farlam, 1988 *Consultus*, 36-37.

⁹⁵ *Ibid.* at 36.

⁹⁶ Quoted from *ibid.*

⁹⁷ Article 3 First and Second Charter of Justice.

Until the 1870s, none of the Cape judges had been trained in Roman-Dutch law. Hence these judges had to apply rules of a legal system they did not really understand. Further, intellectual access to this body of law was difficult because the relevant legal works were written either in Latin or in Dutch. Judges naturally tended to prefer the language of the law in which they had been trained. Due to indifference or inability, judges frequently conducted a superficial analysis of the Roman-Dutch law on the point in question before them, before concluding that the English and Roman-Dutch law were essentially the same.⁹⁸ Often this conclusion was totally incorrect. In most cases, it was English law that in consequence was applied by judges and therefore entered the law reports. The overall picture that emerges is a hazy one. Undoubtedly, judges at the Cape purported to apply Roman-Dutch law and some, for example Menzies, Cloete, Kotzé and De Villiers, adhered more faithfully to Roman-Dutch law than others. However, Roman-Dutch law at the Cape increasingly acquired an English character as the judges superimposed layers of English common law.⁹⁹

Natal judges had even greater difficulties in applying Roman-Dutch law than their Cape brethren, with whom, with few exceptions, they did not compare in quality.¹⁰⁰ Since the majority of judges were not willing to make a serious effort to administer Roman-Dutch law, the Natal Bench inevitably proved the most receptive to English legal influence, at least until 1910.¹⁰¹ Nor was the judiciary in the *Vrystaat* initially of a higher calibre. The early *landdrosten* could by no means be classified as jurists¹⁰², and were laymen.¹⁰³ Professionalism came to the *Oranje Vrystaat* only in 1875 with the establishment of the Supreme Court. Judges were required to be qualified either as doctors of laws or as advocates of at least seven

⁹⁸ See the dictum by Van den Heever JA in *Preller v Jordaan* 1956 (1) SA 483 (A) 504 (A).

⁹⁹ Other mechanisms included the possibility of further appeal to the Privy Council or frequent reference to English cases where English statutes were applied. Generally see Van Zyl, *Geskiedenis*, 454-458; Zimmermann, *Römisch-holländisches Recht in Südafrika*, 13-15; Girvin, *Architects*, 98, 110 and 138 and *Influence*, 223-225, 231 *et seqq.*

¹⁰⁰ Spiller, *District and Supreme Courts of Natal*, 83-8. Exceptions to that observance are most noteworthy Cloete J; Connor CJ and Dove Wilson CJ. See Spiller, *District and Supreme Courts of Natal*, 31 and Girvin, *Architects*, 95 and 110-113.

¹⁰¹ Spiller, *District and Supreme Courts of Natal*, 90.

¹⁰² Again note the details at Scott, *Transvaal*, 91

¹⁰³ Hahlo, *Union*, 241.

years standing.¹⁰⁴ From then on, young jurists, trained for the most part at the Cape, dominated legal life in the *Vrystaat*.¹⁰⁵

An equally sombre picture has been painted of the early judiciary in the ZAR. Judicial officers were mostly farmers and "...illiterate and simple folk, relying on their untrained but literate clerks."¹⁰⁶ However, the appointment of Kotzé as Chief Justice in 1877 proved a great success as he was a strong and erudite judge who strove actively to improve the standards of administration of justice.¹⁰⁷ By 1883, all judges, and not only the Chief Justice, were required to have graduated in law.¹⁰⁸ Notwithstanding this regulation, some appointments were clearly due to nepotism and favouritism. How different then the quality of the Transvaal Bench which was appointed by Lord Milner in 1906, consisting *inter alia* of James Rose Innes, William Solomon and John Wessels, all later to become Chief Justices of the Union of South Africa.¹⁰⁹

Although this is perhaps an over-statement, the judges on the Benches of the two Boer republics tended to adhere more readily to the Roman-Dutch law than the judges in the British colonies. Accordingly, these judges deserve some credit for the retention of Roman-Dutch law and the formation of a mixed legal system in South Africa. One important reason for this tendency was the fact that the two Boer republics enacted legislation according to which 'pure' Roman Dutch law or, more precisely, the law of Holland as it was prior to the British annexation, was to be the law of the republics.¹¹⁰ However, the courts did not necessarily consider themselves bound by these prescriptions as Kotzé's judgement in *Rooth v The State* shows.¹¹¹ Meanwhile, a number of decisions favouring the retention of Roman-Dutch law also

¹⁰⁴ Article 5 Wet betrekkelijk de Hoogere Gerechtshoven.

¹⁰⁵ The first President of the OVS, J H Brand, was a law professor from Cape Town and the second President F W Reitz was a Cape advocate before becoming first Chief Justice in 1874. The second Chief Justice was M de Villiers, the first South African to be professor of law at Leiden University and brother of the eminent Chief Justice of the Cape Colony Lord Henry de Villiers. For an interesting assessment see Sachs, *Justice in SA*, 71-75.

¹⁰⁶ Kotzé, *SALJ* 36 (1919), 134; Hahlo and Kahn, *Union*, 231. In 1859, it was noted in a testimonial that not one of the *landdrosten* had studied Roman-Dutch law.

¹⁰⁷ Kotzé was referred to by the novelist Trollope, *South Africa*, 12 as the 'boy judge' since he was 28 when called to the Bench. See also Sachs, *Justice in SA*, 76 and Scott, *Transvaal*, 98.

¹⁰⁸ Art 2 (c) Law No 3 of 1883.

¹⁰⁹ With regard to the earlier appointments in the ZAR see Hahlo and Kahn, *Union*, 235. On the work of the first Transvaal Bench see particularly Sir James Rose Innes' own account in his *Autobiography*, 198-220.

¹¹⁰ In the OVS and ZAR enactments served as a law of citation since some of the best known Roman-Dutch authors had to be used as binding authorities. See also Hahlo and Kahn, *Union*, 22 *et seqq*; Zimmermann, *Römisch-holländisches Recht in Südafrika*, 21 *et seqq*.

¹¹¹ (1888) 2 SAR 259, 261-265. Also *Preller v Schultz* (1893) 10 CLJ 81, 88-90 and 175-176. Hahlo and Kahn, *Union*, 22

had a lasting effect on the nature of the development of South Africa's mixed legal system.¹¹² By translating the works of Roman-Dutch legal authors into English, judges of this period helped to improve access to Roman-Dutch law.¹¹³ The professionalism, legal education and scholarly knowledge of some of these judges clearly played a decisive role in the shaping of South African law.

1 1 4 Conclusions

Assessing the course of development until 1910 of the judiciary in the various territories which today form South Africa, the overall impression is one of steady improvement. At the end of this period, the administration of justice, due to strong English influences, was on a firm footing. Clear procedural laws guided litigation. Torture had been abolished. Trials were conducted in public. Judges had to give reasons for their judgements, which were published in law reports. At least as regards judges, Bar and Side Bar, these institutions were increasingly staffed by legal professionals. In addition, the establishment of the doctrine of *stare decisis*, the introduction of specific regulations for appointment, dismissal and tenure of judges and, of course, the doctrine of parliamentary supremacy had far-reaching consequences for the institutional framework in which twentieth century South African judges later had to adjudicate. By 1910, judges had undoubtedly become the heart and head of the administration of justice in South Africa. Rightly therefore, one commentator described the judges of the nineteenth century as the architects of South Africa's mixed legal system.¹¹⁴

¹¹² A good example is the response to the so-called doctrine of consideration. The Cape Supreme Court for years held that with regard to the validity of a contract the Roman-Dutch concept of *iusta causa* was equivalent to and replaced by the common law doctrine of consideration (*Alexander v Perry* (1874) 4 Buch 59; *Tradesmen's Benefit Society v Du Preez* (1887) 5 SC 269; *Mtembu v Webster* (1904) 21 SC 323). In the end, however, the Appellate Division in 1919 (*Conradie v Rossouw* 1919 AD 279) accepted the view of the former High Court of Transvaal, which in 1904 (*Rood v Wallach* 1904 TS 187) decided that the doctrine of consideration was alien to Roman-Dutch law. See Rose Innes, *Autobiography*, 209-210; Hutchison, *Contract Formation*, 166-171. Zimmermann, *Law of Obligations*, 556-559; Erasmus, *Interaction*, 151-152.

¹¹³ To name just a few: Melius de Villiers' influential treatise on Voet and the *actio iniuriarum*. James Buchanan's translation of the first three books of Voet's Commentary. Sir John Kotzé in 1885-6 translated S van Leeuwen's *Rooms-Hollands Regt*. Sir Henry Juta translated J van der Linden's *Regtsgeleerd, Prakticaal en Koopmans Handboek*. Sir James Rose Innes translated two titles of Voet's Commentary in 1879. Sir Andries Maasdorp published a translation of H Grotius' *Inleidinge* in 1873. Sir John Wessels' *oeuvre inter alia* included the first publication of a history of Roman-Dutch Law in 1906. In his *Autobiography* Sir James Rose Innes confirmed his appreciation of Roman-Dutch law when he wrote (at 288) that he "...had always been a convinced believer in the Roman-Dutch law as a system."

¹¹⁴ See the title of Girvin's contribution in Zimmermann and Visser, *Southern Cross*, 95-139.

In respect of the topic of this thesis, one of the most important consequences of this broad acceptance of English influences is probably the general appreciation and perception of the judiciary as an almost infallible institution. In due course, any serious criticism of the South African judiciary came to be regarded as disrespectful, if not an affront to the dignity of the institution. This traditional view of South Africa's (superior) judiciary is still in effect today, albeit to a modified degree, and apparently made South African academics reluctant to analyse the topic in more detail.

1 2 Developments after 1910

1 2 1 The courts system

Unlike a number of continental European legal systems, South Africa does not have a uniform courts system.¹¹⁵ Different courts operate at various levels, staffed by personnel ranging from judges with years of practical experience and full legal training to lay assessors. Further, not all the courts fall exclusively under the ambit of the judiciary. While the judicial process is generally vested in the judiciary and its ordinary courts, a plethora of additional courts or tribunals exists outside the judiciary.¹¹⁶

1 2 1 1 Superior courts

(a) The Constitutional Court

The Constitutional Court is a novelty in the South African legal system.¹¹⁷ It is the highest South African court in all matters concerning the interpretation and application of the

¹¹⁵ For a comparison with the German court system see Werle, *SA Courts: A Comparative Analysis*, 37-56. Generally see Van Dijkhorst, *Courts*, 89-117; Hosten *et al*, *Introduction*, 388-411; Du Plessis and Du Plessis, *Introduction to Law*. All, however, on the provisions of the Interim Constitution No 200 of 1993.

¹¹⁶ Baxter, *Administrative Law*, 240 has described the bridging function of these tribunals between the judicial and the administrative process as: "...[T]hey really complement, rather than substitute for, the ordinary courts of law."

¹¹⁷ The introduction of the Constitutional Court into the legal system was not unanimously applauded. Some favoured simply the enlargement of the Appellate Division's jurisdiction. See for instance Hiemstra, 1992 *Consultus*, 119-120. On the work of the Technical and the Planning Committee see Du Plessis and Corder, *Bill of Rights*, 194-199. Claasen, *THR-HR* 57 (1994), 414-417; Chaskalson, *Reshaping*, 13-24.

Constitution.¹¹⁸ Above all, this includes the enforcement of the Bill of Rights¹¹⁹, the power to review the constitutionality of executive and legislative acts¹²⁰ and the determination of constitutional disputes between organs of state.¹²¹ The Constitutional Court is not an integral part of any of the other superior courts of South Africa, particularly the Supreme Court of Appeal. Currently, there are eleven Constitutional Court judges: seven male, five female; seven White and four non-White. Its seat is at Johannesburg.¹²²

(b) *The Supreme Court of Appeal*

According to ss 166 (b) and 168 (3) of the Constitution of the Republic of South Africa of 1996, the Supreme Court of Appeal is the highest court of appeal in South Africa except in constitutional matters.¹²³ It is devoid of any original jurisdiction. The court consists of a Chief Justice and 15 judges of appeal.¹²⁴ Of the present judges on the Bench, one is non-White.¹²⁵ There are no females at the Supreme Court of Appeal at present. The court's seat is at Bloemfontein.

Under the old dispensation, the Supreme Court of Appeal was the Appellate Division of the Supreme Court of South Africa. It was formed in 1910 as the result of the political uniting into the Union of South Africa of the four British Colonies: the Cape of Good Hope, Natal, Orange River Colony and Transvaal.¹²⁶ In 1910, the establishment of a new structure of superior courts within the unified country was widely welcomed.¹²⁷ The scheme adopted was the creation of a uniform Supreme Court as superior court with different provincial and local divisions¹²⁸, including an appellate division. When in 1950 the possibility of lodging appeals to the Privy Council was abolished, the Appellate Division became the highest court in the country.

¹¹⁸ No 108 of 1996.

¹¹⁹ Section 167 (3) (a) Constitution.

¹²⁰ Section 167 (4) (b) Constitution.

¹²¹ Section 167 (4) (a) Constitution.

¹²² Section 167 (1) Constitution. Data as of 28 May 1998. The kind assistance of the Department of Justice's Chief Directorate of Communications Services Mr. De Villiers Bosman is acknowledged here.

¹²³ Van Dijkhorst, *Courts*, 92; Hosten *et al*, *Introduction*, 389; Du Plessis and Du Plessis, *Introduction to Law*, 88.

¹²⁴ Section 168 (1) Constitution.

¹²⁵ Data as of 28 May 1998. See above at fn122.

¹²⁶ South Africa Act of 1909 (9 Edw VII ch.9), Preamble. See further Item 16 (3) (a) Schedule 6 of the Constitution.

¹²⁷ Corder, *Judges at Work*, 20.

¹²⁸ The Eastern Districts, Griqualand West and Witwatersrand courts became local divisions of their respective provincial divisions. See Hahlo, *Union*, 249.

(c) *The High Court of South Africa*

The established structure of the four provincial and various local divisions of the Supreme Court of South Africa was subject to change after the end of apartheid.¹²⁹ First, the South West Africa Provincial Division ceased to be an integral part of the Supreme Court when South West Africa was granted independence in 1990. Then, the High Courts of the former so-called independent Homelands had to be re-integrated into the structure of the superior courts of South Africa.¹³⁰ Finally, under s 166 (c) of the Constitution, the provincial divisions of the Supreme Court became divisions of the High Court of South Africa. However, item 16, schedule 6 of the Constitution, requires that the future structure of the High Court be in accordance with the newly created nine provinces.

To date, no such rationalisation has taken place. Pending these changes, the High Court continues to consist of six provincial divisions¹³¹ and three local divisions.¹³² For the time being, the former TBVC supreme courts¹³³ continue to function within the nine provinces, although apparently not as provincial or local divisions of the High Court of South Africa.¹³⁴ With regard to certain matters, the divisions of the High Court are courts of first instance. They also hear appeals and review applications from the lower courts. Any constitutional matter, except matters that are exclusively decided by the Constitutional Court, may also be heard.¹³⁵ At present, the High Court (in its narrow sense) consists of 131 judges, of which 14 are non-white and 6 are female. If one adds the former TBVC supreme courts to this scheme the numbers rise to 149 judges, of which 22 are non-White and 6 are female.¹³⁶ In comparison, in 1988 the Supreme Court consisted of 140 White male judges; in 1978 of 86 and in 1957 of 57 judges.¹³⁷

¹²⁹ See Van Dijkhorst, *Courts*, 94; Hosten *et al*, *Introduction*, 390.

¹³⁰ For details on courts which have been temporarily 'outside' South Africa see Hosten *et al*, *Introduction*, 397-400.

¹³¹ Cape of Good Hope, Eastern Cape, Northern Cape, Natal, Orange Free State and Transvaal.

¹³² South Eastern Cape, Durban and Coast as well as Witwatersrand.

¹³³ Transkei, Bophuthatswana, Ciskei and Venda Supreme Court.

¹³⁴ See *Sithole v. Minister of Defence* 1995 (1) SA 205 (T) 214 (A)-(C).

¹³⁵ Section 169 (a) (i) Constitution.

¹³⁶ Data as of 28 May 1998. See fn122 for full reference.

¹³⁷ Dugard, *Human Rights*, 115; Corder, *Judicial Branch*, 67.

It is necessary to keep in mind that superior court judges are not considered civil servants in the ordinary sense regardless of the fact that they adjudicate in the name of the state, and receive monthly salaries and pensions from the state.

(d) *Specialised superior courts*

There are a number of special courts that have been established to bring expertise to the adjudication process in complex legal areas such as tax, labour, and trade marks or copyright law. Some of these courts, for example the labour courts, are courts in the ordinary sense.¹³⁸ Others, for example the income tax courts, are in fact tribunals which adjudicate in a highly formal (court-like) manner. These court tribunals are staffed by three members, the president generally being a judge. He or she is assisted by two lay members, who have significant knowledge in their respective fields. These court tribunals are the highest administrative courts in South Africa. At present, the following nine special courts have been established: a Maritime Court, water courts, patents courts, trade marks courts, copyright courts, expropriation and compensation courts, restrictive practices courts, a Land Claims Court, and income tax courts. Except perhaps for the latter, these court tribunals enjoy the same status as the superior courts of law.¹³⁹

1 2 1 2 *Inferior courts*

Prior to 1917, each province retained its own pre-Union magistrates' courts system. Thereafter, a unitary system of magistrates' courts in 300 magisterial districts was created.¹⁴⁰ The magistrates courts are courts of first instance and have both criminal and civil jurisdiction, although not unlimited. Serious matters (civil and criminal) are confined to regional courts, which therefore have geographically extended jurisdiction.¹⁴¹ This scheme will undergo some significant changes when the Magistrates' Courts Amendment Act of 1993

¹³⁸ For details see Du Toit *et al*, *Labour Relations Act*. In terms of the Labour Relations Act No 66 of 1995 these courts replaced the Industrial Court and the former Labour Appeal Court. As of 28 May 1998 ten judges sit on the Benches of the Labour court and the Labour Appeal Court, of which eight are white males and two are non-white males. For full reference as to the data see above at fn122.

¹³⁹ Although the income tax courts are staffed by a judge and two lay assessors, their decisions do not have the force of binding precedents. See Baxter, *Administrative Law*, 244 fn 350; Govender, *Acta Juridica* 36 (1993), 76 and 79; Claasen, *THR-HR* 57 (1994), 436.

¹⁴⁰ Hosten *et al*, *Introduction*, 403.

¹⁴¹ *Ibid.* at 403-406.

comes into operation.¹⁴² A more pronounced distinction between the civil and criminal functions of the lower courts is envisaged, whereby magistrates' courts and regional courts will deal with criminal matters only. Following the same scheme, civil matters of minor importance will be dealt with by so-called civil courts for districts, and divisional civil courts will receive extended jurisdiction in civil matters.¹⁴³ In 1993, South Africa, excluding the TBVC territories, had 1 075 magistrates. Of these magistrates, 1 036 were White.¹⁴⁴

Other inferior courts are the children' and the family courts.¹⁴⁵ These courts are administered by magistrates. In addition there operate the small claims courts and the short process courts. These courts are administered by so-called commissioners or adjudicators.¹⁴⁶

Until 1993, magistrates, commissioners and adjudicators were part of the civil service or they were volunteers, appointed by the Minister of Justice. In any event, they continued to be subject to direction from above. There was no question of inferior judges being truly independent judicial officers. In this respect, their institutional position was considerably different from that of superior court judges.¹⁴⁷ We will return to this point later.

1 2 1 3 *Administrative tribunals*

Besides the more formalised court tribunals to which we have already referred above, there are a vast number of less formal tribunals that take an active part in the adjudication process, including over 20 appellate boards alone to which one can turn in order to have an administrative decision reconsidered. To mention just a few, there are licensing appeal boards, town and regional planning appeal boards, immigration appeal boards, the Publications Appeals Board, the Rent Control Board and the Workmen's Compensation Commissioner.¹⁴⁸ There are, further, numerous local administrative control boards of first instance; for example,

¹⁴² No 120 of 1993.

¹⁴³ Section 2 29B, 46A and 50A Pendlex Magistrates' Courts Act No 32 of 1944 after the Magistrates' Courts Amendment Act No 120 of 1993. Included in *Juta's Statutes of South Africa*, 2-49.

¹⁴⁴ Fernandez, *Analysis and Critique*, 117.

¹⁴⁵ See s 9 (1) (a) (v) Magistrates' Courts Act No 32 of 1944; s 5 Child Care Act No 74 of 1983.

¹⁴⁶ See Hosten *et al*, *Introduction*, 405-408; Van Dijkhorst, *Courts*, 108.

¹⁴⁷ Labuschagne 1993 *De Jure*, 360. A different opinion is shared by Wiechers, *Administrative Law II*, 97 fn5.

¹⁴⁸ Rabie, 1979 *De Jure*, 146; Baxter, *Administrative Law*, 266; Govender, *Acta Juridica* 36 (1993), 82; partly outdated is Will, *Machinery of Law*, 284-320.

local road and air transportation boards, rent boards and liquor boards.¹⁴⁹ Registrars in certain branches of the public service also adjudicate. There are *inter alia* the Registrars of Trade Marks, Banks, Pension Funds, Patents, Deeds, Companies and Building Societies.¹⁵⁰ The number of administrative tribunals and the variety of procedural rules, staffing or appeal procedures is mind boggling. At present, there is talk of introducing an administrative appeal court in order to unravel the existing state of confusion.¹⁵¹

1 2 1 4 Courts of chiefs and headmen

Finally, it is worth noting that a remnant of the heyday of apartheid continues to exist in the African divorce courts.¹⁵² These courts can hear matrimonial disputes between Africans on the basis of customary law. All other commissioners' courts and appeal courts (on customary law matters) established under the Black Administration Act of 1927 were abolished in 1986.

1 2 2 Institutional Aspects

It is common knowledge that South Africa's judiciary found itself for most of this century in the maelstrom of apartheid politics. Taking this into account, a description of the role of South Africa's judiciary that aims beyond a mere presentation of structure should focus on the degree of independence from political interference enjoyed by the judiciary during this period. A suitable test might consist of two parts. The judiciary's independence may be assessed

¹⁴⁹ Du Plessis and Du Plessis, *Introduction to Law*, 94; Baxter, *Administrative Law*, 265; Govender, *Acta Juridica* 36 (1993), 80-81; Hahlo and Kahn, *Union*, 141.

¹⁵⁰ Van Dijkhorst, *Courts*, 110; Hahlo and Kahn, *Union*, 278.

¹⁵¹ Govender, *Acta Juridica* 36 (1993), 82 remarks, that the state of the tribunals in South Africa at present is not much different from the state of the English tribunals that lasted into the 1950s which were once described as follows: "Some tribunals sat in public, others sat in private. Some allowed unrestricted legal representation, others allowed none. Some followed legal rules of evidence, others disregarded them. One allowed full examination and cross-examination of witnesses, others allowed witnesses to be questioned only through the chairman. Some took evidence on oath, others did not. Some gave reasoned decisions, others did not." See also Baxter, *Administrative Law*, 267 *et seqq.*

¹⁵² See s 71 Magistrates' Courts Amendment Act No 120 of 1993 and Special Courts for Blacks Abolition Act No 34 of 1986. A structure of special black courts was introduced to South Africa in 1927 by the Black Administration Act. Hence courts of chiefs and headmen were enabled to apply customary law in all civil and criminal disputes where the parties were black people, with the exception of certain serious offences as rape or murder. The divorce courts were created by s 10 Black Administration Act (1927) Amendment Act No 9 of 1929. Generally see Hosten *et al*, *Introduction*, 410; Van Dijkhorst, *Courts*, 111-113.

positively by questioning whether it enjoyed unrestricted jurisdiction and a right to judicial review. Negatively, one may ask by which devices and how effectively was the judiciary protected from external influences.

1 2 2 1 Power of judicial review and the ambit of the judiciary's jurisdiction

Section 2 of the South African Constitution states that the Constitution is the supreme law of the country. In addition, s 165 (1) and (2) of the Constitution state that all judicial authority is vested in the courts and that all courts are independent and subject only to the Constitution and the law. Hence, the courts' task is to uphold and to protect the Constitution. One of the most important means of fulfilling this task is judicial review. Section 172 (1) assigns to the courts the power to review the constitutionality of all legislative and executive acts.¹⁵³

However, for most of this century it was Parliament that reigned supreme under the so-called Westminster System.¹⁵⁴ This traditional English concept was implanted in South Africa by virtue of the South Africa Act of 1909.¹⁵⁵ The decisive characteristics of the Act were indivisibility, unlimitability and originality.¹⁵⁶ The unlimitability of parliamentary sovereignty, in particular, denied the courts power of full judicial review. According to ss 35, 137 and 152 of the South Africa Act, superseded by s 34 (2) of the Republic of South Africa Constitution Act of 1983, courts were not entitled to pronounce on the validity of any Act of Parliament. The only testing right was to declare invalid legislation that was enacted in non-compliance with the prescribed procedure.¹⁵⁷ Denial of the right to full judicial review placed the judiciary in a difficult position during the years of apartheid: it was mostly by means of

¹⁵³ Basson, *Interim Constitution*, 13 and 143; Du Plessis and Corder, *Bill of Rights*, 109-116.

¹⁵⁴ Dicey, *Introduction*, 70 defined this supremacy as follows: "[T]he principle of parliamentary sovereignty means neither more or less than this, namely that parliament has under the English constitution the right to make or unmake any law whatever, and further that no person or body is recognised by the law of England as having the right to override or set aside the legislation of parliament."

¹⁵⁵ 9 Edw VII Ch 9 (1909).

¹⁵⁶ Hahlo and Kahn, *Union*, 146.

¹⁵⁷ South Africa Constitutional Act No 110 of 1983. See also s 18 (1) and (2). See in this regard *Mpangele & Another v Botha & Others* 1982 (3) SA 633 (N). Further details at Dugard, *Human Rights*, 14 and 25-36; Boulle *et al*, *Constitutional and Administrative Law*, 146-149; Corder, *Judges at Work*, 8; De Vos, *South African Judiciary*, 44.

legislative measures, invariably enacted in correct form and manner by an omnipotent, undemocratic and racist Parliament, that apartheid was entrenched and enforced.¹⁵⁸

When, in the early 1950s, the Appellate Division declared invalid pieces of apartheid legislation that were intended to remove 'Cape Coloureds' from the common voters' roll, a constitutional crisis arose.¹⁵⁹ Even though the government's first attempts misfired, in the final analysis they were successful.¹⁶⁰ By a 10 to 1 majority, the Appellate Division decided that the South Africa Act Amendment Act 9 of 1956 was valid since the Act had been passed in procedurally correct form.¹⁶¹ South Africa's judiciary had shown the limits of its constitutional powers.

In addition, Parliament increasingly excluded and limited the courts' inherent jurisdiction in certain matters. The extent this exclusion had reached by the 1990s is evident from the Abolition of Restrictions on the Jurisdiction of Courts Act 88 of 1996. After 1927, Parliament enacted 108 sections and subsections that restricted the courts' jurisdiction. Although not all restrictions were as drastic as the so-called ouster clauses in security legislation¹⁶², it is clear how widely the inherent authority of South Africa's judiciary in all legal matters had been limited.¹⁶³

¹⁵⁸ Prior 1948, the scope of the courts testing right was raised in *R v Ndobe* 1930 AD 484 and *Ndlawana v Hofmeyr* No 1937 AD 229. See Corder, *Judges at Work*, 152-155 as well as Boule et al, *Constitutional and Administrative Law*, 132-135.

¹⁵⁹ Apparently this was not the first constitutional crisis within the *trias politica*. The crises in the *Vrystaat* and particularly in the ZAR bear striking similarities to the 1950's crisis. In each instance, the crucial issue was the scope of the testing right of the judiciary. Generally see Forsyth, *Danger for Their Talents*, 61-74 with further references at 61 fn20; Kahn, *O D Schreiner*, 35-59; Boule et al, *Constitutional and Administrative Law*, 117-123 and 132-149.

¹⁶⁰ Separate Voters Act No 46 of 1951 rejected by the Appellate Division's decision in *Harris v Minister of Interior* 1952 (2) SA 428 (A) and High Court of Parliament Act No 35 of 1952 declared invalid by the decision in *Minister of Interior v Harris* 1952 (4) SA 769 (A).

¹⁶¹ *Collins v Minister of Interior* 1957 (1) SA 552 (A). According to the Appellate Division Quorum Act No 27 of 1955 an additional six judges of appeal had to be nominated. See also below at 1.2.2.2.

¹⁶² See for example sec 5B Public Safety Act No 3 of 1955; Natives Act No 64 of 1956 or the infamous ss 28, 29 and 30 of the Internal Security Act No 74 of 1982. Further *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A). See Basson, *SAJOHR* 3 (1987), 28-43 for a discussion.

¹⁶³ Mathews, *Freedom*, 28-29; Andrew, *South Africa*, 296.

1 2 2 2 Appointment to, removal from and tenure of office

Procedures with regard to appointment and removal of judges play a pivotal role in providing for a truly impartial and independent judiciary.

Throughout legal history, the process of appointing judges has been a subject of intense controversy.¹⁶⁴ Recent events in South Africa provide us with yet another illustration of this historical tendency.¹⁶⁵ According to s 100 of the South Africa Act of 1910 and, later, s 10 (1) (a) of the Supreme Court Act 59 of 1959, judges were appointed by the head of state on the recommendation of the Minister of Justice. The lack of more detailed regulations put this sensitive process completely at the mercy of the executive.¹⁶⁶ This inevitably led to a number of critically received appointments to and promotions within the Bench.¹⁶⁷

The events surrounding the enactment of the controversial Appellate Division Quorum Act 27 of 1955 are further proof of the tendency of the executive to pack the Bench.¹⁶⁸ Once the tendency was established, highly qualified but politically unsafe candidates for promotion continued to be overlooked throughout the apartheid years.¹⁶⁹ In 1983, the Hoexter Commission *inter alia* noted the following in regard to the appointment process:

“There are indications in the evidence before the commission that...for elevation...individual merit has not always been the decisive factor. Judicial appointments sometimes betray an element of arbitrariness.”¹⁷⁰

¹⁶⁴ Some colourful legal historic examples from the Common Law can be found in Gauntlett, 1990 *Consultus*, 23.

¹⁶⁵ The intense public debate on the appointment of the present Chief Justice in 1996 has been described by a commentator as “...one of the most divisive rows to hit the judiciary since the 1950s” (M Soggot in Mail & Guardian September 20-26, 1996 at 4). Further see Mail & Guardian September 20 - 26, 1996 at 4-5; Cape Times October 4, 1996 at 8.

¹⁶⁶ Even though it might have been regarded as general practice to exercise any appointment in close connection with the respective Judge President or the Chief Justice, no single statute provided for this. See Kahn, *O D Schreiner*, 37-38.

¹⁶⁷ See particularly the comments with respect to common practice in appointing judges made by the Hon Mr Justice Didcott in his evidence before the Hoexter Commission. See Kahn, *SALJ* 97 (1980), 661-662; Corder, *Judges at Work*, 23 fn33 and 39.

¹⁶⁸ In terms of this Act, legislated at the climax of the constitutional crisis, it was required that eleven judges sat on a case where the validity of an Act of Parliament was in question. Since the Appellate Division at that time consisted of only five judges, six additional judges had to be appointed. It is indisputable that the appointments of some of the six were political appointments to secure the franchise question. For details see Forsyth, *Danger to Their Talents*, 14-25; Hahlo and Kahn, *Union*, 159; Corder, *Supreme Court*, 96-98.

¹⁶⁹ Kahn, *SALJ* 97 (1980), 661-662 and *O D Schreiner*, 48 and 53; Gauntlett, 1990 *Consultus*, 23-24.

¹⁷⁰ *Commission of Inquiry into the Structure and the Functioning of the Courts* RP 78/83 Part A 59.

However, the commission's recommendation of an independent judicial appointment commission was not accepted.¹⁷¹ On the contrary, the situation worsened when the executive decided in 1987 to 're-appoint' Rabie CJ as Acting Chief Justice for another two-year term following his retirement at the age of 70.¹⁷² It also promoted Natal Judge President Milne to the Appellate Division, apparently in order to stop him from assigning political suits to judges critical of the government.¹⁷³

With regard to aspects of removal from office, s 101 of the South Africa Act of 1909 and later s 10 (7) of the Supreme Court Act of 1959 stated that a judge could be removed from office only by the Governor-General or the State President upon address of both Houses of Parliament during the same session, on the ground of misbehaviour or incapacity.¹⁷⁴ Not a single South African judge has been removed from the Bench so far. Nonetheless, at the height of the constitutional crisis in the 1950s, the National Party considered legislation to remove all judges of appeal from office.¹⁷⁵

It is little wonder that the formal means of protection of judicial independence came under review after the end of the apartheid era.¹⁷⁶ New regulations have been introduced to secure the process of nomination, appointment and removal from undue influence. According to s 174 (1) of the Constitution, any "...appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer". The President and the Deputy Judge President of the Constitutional Court are appointed by the State President after consulting the Judicial Service Commission (JSC) and the leaders of the parties in the National Assembly.¹⁷⁷ Other constitutional court judges are appointed by the State President from a list of candidates

¹⁷¹ *Ibid* at 60.

¹⁷² The retirement age is now regulated in ss 3 - 4 Judges' Pensions and Remuneration Act of 1989.

¹⁷³ According to Abel, *Politics*, 18 allegedly because the executive considered Rabie's potential successors as not sufficiently capable or politically loyal. See also Cameron, *SAJOHR* 3, 345; ICJ, *Report*, 111. But see Editorial, 1989 *Consultus*, 5.

¹⁷⁴ Amended by s 1 Act No 18 of 1985. See Labuschagne, 1993 *De Jure*, 361-362.

¹⁷⁵ For the whole see Forsyth, *Danger for Their Talents*, 36 with further references.

¹⁷⁶ See generally the contributions in Norton, *Reshaping the Structures*; Corder, *Empowerment and Accountability* further Corder's contribution with regard to the appointment of judges in *Stellenbosch LR* 2 (1992), 207-229; Gauntlett, 1990 *Consultus*, 22-23; Cameron, *SAJOHR* 6 (1990), 251-265; Sarkin, *SAJOHR* 9 (1993), 223-227; Labuschagne, 1993 *De Jure*, 360-361.

¹⁷⁷ See s 174 (3) Constitution.

prepared by the JSC.¹⁷⁸ The Chief Justice and the Deputy Chief Justice are appointed by the State President solely, after consultation with the JSC.¹⁷⁹ All other judges of the Supreme Court of South Africa are appointed by the State President on the advice of the JSC.¹⁸⁰ Other judicial officers must be appointed in terms of an Act of Parliament which must ensure all necessary safeguards to protect the impartiality and independence of the officer.¹⁸¹ Judges of the Constitutional Court hold office for a non-renewable term of 12 years. Like all other judges they have to retire at the age of 70.¹⁸²

From the foregoing, it is obvious that the JSC plays a crucial role in the nomination process. This advisory body is entirely new to South Africa.¹⁸³ It was devised to take the selection process out of the hands of the executive and to create a body consisting of members of the legal as well as non-legal professions. According to s 178 (1) of the Constitution, the JSC consists at present of 10 legal and 15 non-legal members.¹⁸⁴ The importance of the JSC is further evident from its role in the process of removal of a judge. The Constitution provides that the State President can remove a judge only if the JSC finds that the judge suffers from incapacity, is grossly incompetent or is guilty of misconduct, and the National Assembly calls for that judge to be removed by a resolution supported by at least two-thirds of its members.¹⁸⁵

1 2 2 3 *Remuneration*

According to s 10 (1) (a) of the Supreme Court Act of 1959, judicial salaries are determined by the Judges' Remuneration and Conditions of Employment Act of 1989 as amended and, as

¹⁷⁸ Section 174 (4) (a) and (b) Constitution. For the qualifications of the constitutional court judges see s 174 (5) Constitution.

¹⁷⁹ Section 174 (3) Constitution.

¹⁸⁰ Section 174 (6) Constitution.

¹⁸¹ Section 174 (7) Constitution.

¹⁸² Section 176 (1) and (2) Constitution; s 3 Judges' Pensions and Remuneration Act of 1989 as amended.

¹⁸³ For details on development towards the JSC see Corder, *Empowerment and Accountability*, 8-11 and *Stellenbosch LR* 2 (1992), 207-230; Gauntlett, 1990 *Consultus*, 23-27; O'Regan, *Enforcement*, 3-6. A critical assessment of the JSC is provided for by R Calland 'Scrutinising the JSC's scrutineers' *Cape Times* October 4, 1996 at 8.

¹⁸⁴ The JSC's novel approach to the appointment process is also evident from the fact that it proposed to promote to the Bench not only senior members of the Bar but also senior magistrates as well as academics. At present there are three academics on the Constitutional Court (A Sachs, K O'Regan and Y Mokgoro). In 1995 Professor J Hlophe was appointed to the Cape of Good Hope Provincial Division of the High Court and in 1998 Professor D Davis was appointed to the same court.

¹⁸⁵ Section 177 (1) and (2) Constitution.

an additional safeguard, may not be reduced during the judge's term in office.¹⁸⁶ Furthermore, no judge may hold any other office or receive any emoluments or remuneration other than his or her salary.¹⁸⁷

1 3 The role of South Africa's judiciary in the twentieth century

An overview of the development of South Africa's judiciary would be incomplete if it did not address the questions that arise with regard to the role the judiciary played during the period of apartheid.¹⁸⁸

From a subjective point of view it appears that, throughout the century, well-trained and experienced judges sat on the Benches of the South African superior courts.¹⁸⁹ Hence it would be quite inappropriate to discuss professionalism and legal education of judges as in earlier chapters. The professional development of South Africa's judiciary rested on the improvements made at the end of the last century, and was boosted in the main by the creation of full-time law faculties at South Africa's universities, which finally put legal education on a firm footing.¹⁹⁰ Today, an LLB degree is obligatory for admission to the Bar and Side Bar.¹⁹¹ The structure of the Bar and its interaction with the Bench is important in this regard. Remarkably, the close relation between Bench and Bar has remained basically unaltered, even though litigation in a modern and industrialised state has changed considerably since the last century. The Bar remains a small and highly exclusive society with considerable institutional prestige, which provides its members with years of practical experience before they are eligible for an appointment to the Bench.¹⁹²

¹⁸⁶ Section 176 (3) Constitution and s 10 (1) (a) Supreme Court Act of 1959; ss 2 and 5 Judges' Remuneration and Conditions of Employment Act of 1989.

¹⁸⁷ Section 11 Supreme Court Act of 1959.

¹⁸⁸ The critical literature on the judiciary's performance has grown constantly over the last 30 years. A recent and comprehensive overview on published works (not necessarily articles) is provided by Abel, *Politics*, 555. For a useful historical overview see Dyzenhaus, *Hard Cases*, 32-49.

¹⁸⁹ See for example Corder, *Judicial Branch*, 67-68.

¹⁹⁰ As successors to the University of the Good Hope which has been only an examining body. See the University Acts No 12, 13, 14 of 1916. On the history of the University of Cape Town's law faculty see H Phillips, *UCT*, 1-13 and 66-70. At present there are 18 law schools operating in South Africa.

¹⁹¹ Zimmermann, *Juristenausbildung in Südafrika*, 986.

¹⁹² Abel, *Lawyers*, 23 and 48 states in regard to the prestige of English barristers that their status "...is a composite of history, ascribed characteristics, functions, conventions of deference, the visibility of a few stars, and an exclusive

A generally sound base of legal training and experience, however, was no guarantee of objective and equitable judgements: a university education at generally White law schools¹⁹³ and, later, in lucrative private practice at the almost exclusively White Bar did not necessarily help to foster potential judges' understanding of the needs and realities of the majority of South Africa's citizens.¹⁹⁴ During the later years of apartheid, which saw South Africa's judiciary applying the fiercest laws – whether perforce or not is a moot point¹⁹⁵ – judges came under intense suspicion as to the part they played in the machinery of apartheid. This came as a surprise to the judiciary, which was held in particularly high esteem by South Africa's White minority.¹⁹⁶ Criticism was initially cautious since it easily led to serious consequences for the critics themselves.¹⁹⁷ Overall, an atmosphere prevailed which the late Professor B van Niekerk once described as follows:

“...the functioning of the members of the judiciary in South Africa for all purposes takes place in a sort of intellectual vacuum, where their actions, their attitudes and failings (both as individuals and as a group) remain unscrutinised amidst the sycophantic praise customarily piled on them...”¹⁹⁸

Over the years, the judiciary had been elevated to holy cow status and was surrounded by an ‘aura of infallibility’.¹⁹⁹ As will be seen, the present debate on the question of judicial delictual liability has also been affected by this view.

relationship with the Bench.” This also applies to South African advocates. Corder, *Judicial Branch*, 68; Cameron *et al*, 1980 *De Rebus* 430 and *Judicial Accountability*, 184.

¹⁹³ Extension of University Education Act No 45 of 1959 abolished by the Universities Amendment Act No 83 of 1983.

¹⁹⁴ Cameron, *SAJOHR* 6 (1990), 255-256; Forsyth, *SAJOHR* 7 (1991), 4; Corder, *Judicial Branch*, 68 and *Supreme Court*, 96 as well as *SA Public Law* 7 (1992), 181-183.

¹⁹⁵ See again above at 1 2 2 1. See Hahlo and Maisels, *Virginia Law Review* 56 (1966), 12-14; Van den Vyver, *Seven Lectures*, 12-16; Van Blerk, 1992 *Consultus*, 137. More critical are Millner, *Current Legal Problems* 14 (1961), 280 at 305-306; Dugard, *Human Rights*, 36; Corder, *Judges at Work*, 237 and 239-240; ICJ, *Report*, 109-114; Basson, *Interim Constitution*, 16-18.

¹⁹⁶ Some describe South Africa's judges as equally eminent as English judges since the latter would consider only the South African judges as their equals. See Claasen, *SALJ* 87 (1970), 25.

¹⁹⁷ Note the contempt of court prosecutions against the late Professor B van Niekerk in *S v Van Niekerk* 1970 (3) SA 655 (T) and 1972 (3) SA 711 (A). Some authors (Sachs, Millner) appeared on a list of authors who in terms of sec 16 (6) (a) of the Internal Security Act No 74 of 1982 were not to be quoted. G Bindman was not readmitted to the Bar after he chaired the 1987 ICJ's inquiry. A Sachs was the victim of a bomb attack and R Suttner was jailed for several years.

¹⁹⁸ *SALJ* 95 (1978), 592-593.

¹⁹⁹ Marcus, *SAJOHR* 1 (1985), 237; Cameron, *SAJOHR* 6 (1990), 255 and *Judicial Accountability*, 185; Corder, *Judges at Work*, 2 and Corder, *Supreme Court*, 94; Motale, *CILSA* 24 (1991), 291-293.

Although differences in terms of ideological (liberal, socialist, Marxist) or theoretical (instrumentalist, structuralist, realist) perspectives of the various critics are apparent, the essence is the same: the judgements of the courts, especially in regard to questions of race, internal security and human rights, were generally an abandonment of basic liberal values and freedoms regardless of a strong English and Roman-Dutch tradition in that respect. The judiciary was described as executive- or establishment-minded.²⁰⁰ Under strong positivistic influence, the courts confined themselves to a mere application of the legislation and abandoned an activist law-making position.²⁰¹ It was argued that the judiciary as a predominantly White group of men saw their role rather as protectors of established values, of social stability and of the *status quo* than as proponents of true equality.²⁰²

Not surprisingly, this acid criticism has evoked wrathful reactions from the judiciary, the executive, politicians and also from academics.²⁰³ The critics were *inter alia* said to have used inaccurate, selective and inconclusive statistical data.²⁰⁴ It was argued that needless damage was caused to the judiciary by unwarranted criticism since the critical literature tended towards oversimplification, generalisation, exaggeration, one-sidedness and distortion.²⁰⁵

However, contrary to the opinion of some, it appears that most of the judiciary's critics seem to have borne in mind that simple generalisations were misplaced in this debate.²⁰⁶ It was acknowledged by the critics that, throughout the era of apartheid: there were judgements that

²⁰⁰ ICJ, *Erosion*, iv; Hlophe, *SALJ* 112 (1995), 25; Sachs, *Justice in SA*, 258; Dugard, *Human Rights*, 380. Confirmed also by a number of judges, see Cameron, *SALJ* 99 (1982), 40; Cowling, *SAJOHR* 3 (1987), 177-178.

²⁰¹ Corder, *Judges at Work*, 12, 232; Millner, *CLP* 14 (1961), 300; Dugard, *Human Rights*, 368; Ellman, *Time of Trouble*, 232; Sachs, *Justice in SA*, 260. The various aspects of the positivistic debate, undoubtedly, have been condensed by Dyzenhaus, *Hard Cases*. For an interesting comparative analysis see Herdegen, *Stellenbosch LR* 1 (1990), 336-346.

²⁰² Dugard, *Human Rights*, 380; Corder, *Judicial Branch*, 67 and 77; Motala, *CILSA* 24 (1991), 298, Dyzenhaus, *Hard Cases*, 49-51. For a valuable summary of the developments in South Africa see De Vos, *South African Judiciary*, 43-67 and Forsyth, *Time of Crisis*, 25-35.

²⁰³ See Abel, *Politics*, 12-13; Van Blerk, *Judge and be Judged* and *SALJ* 99 (1982), 365 as well as 1992 *Consultus*, 135-140; Steyn, *THR-HR* 30 (1967), 101; Ogilvie Thompson, *SALJ* 89 (1972), 23; Rumpff, *SALJ* 91 (1974), 529; Rabie, *De Jure* 16 (1983), 21; Coetsee, *SAJOHR* 4 (1988), 94. In a speech to the Association of Law Societies in 1988 then Minister of Justice Coetsee ascribed criticism at the judicial system to 'radical and activist practitioners and academics' to whom the existence of a judicial system with a good reputation was an 'obstacle'. See 1988 *Annual Survey of SA Law*, 517. In the presence of increasingly sharp international criticism the Government in 1968 published a defensive report titled *South Africa and the Rule of Law*.

²⁰⁴ Van Blerk, *Judge and be Judged*, 135-138; Corder, *Judicial Branch*, 76.

²⁰⁵ Van Blerk, 1992 *Consultus*, 135.

²⁰⁶ De Vos, *South African Judiciary*, 49.

stood up to the high expectations of fairness and justice²⁰⁷; there were judges not necessarily suspected of liberal tendencies, who gave fair and reasonable judgements²⁰⁸; that a human rights tradition had developed under the influence of some judges; that certain rules inherent in the community of the Bar have helped to sustain and to reinvigorate this tradition²⁰⁹; that liberal judgements which found loopholes in apartheid legislation were negated by following 'blocking' legislation²¹⁰; that a judge was indeed in a dilemma in having sworn to apply the law but having to defy the dictates of his conscience when it came to the application of draconian security and unjust race laws²¹¹; and that the Appellate Division during the constitutional crisis of the 1950s took a firm stand against the measures of Parliament and the government.²¹²

It is important to note that the debate has been predominantly an academic one. However, the vast majority of South Africans also took a critical view of judges. Despite averments to the contrary, the judiciary suffered a serious crisis of legitimacy.²¹³ Moreover, the judiciary was totally unrepresentative of South Africa's population at large. In 1990, all judges were still White. The first non-White judge ever in South Africa's entire legal history accepted an appointment only in 1991.²¹⁴ At that stage, there had been only one White female judge.²¹⁵ In 1990, a mere 19 out of 981 magistrates were non-White.²¹⁶ This exclusively White magistracy was perceived as not independent and as biased in favour of the state.²¹⁷ Such inroads into fundamental procedural liberties as restriction of the *audi alteram partem* rule or detention

²⁰⁷ Corder, *Judges at Work*, 76; Motale, *CILSA* 24 (1991), 296.

²⁰⁸ Sachs, *Justice in SA*, 144 and 257; Ellman, *LSE* 20 (1995), 419; Dugard, *Human Rights*, 322-323; Millner, 1962 *ILLQ*, 887; Ellman, *Times of Trouble*, 230; see for example *Nkwentsha v Minister of Law and Order* 1988 (3) SA 99 (A).

²⁰⁹ Ellman, *Times of Trouble*, 205 *et seqq.* and 230; Sachs, *Protecting Human Rights*, 99.

²¹⁰ Corder, *Judges at Work*, 243; Sachs, *Justice in SA*, 147; Green, 1987 *WLR*, 341; Andrew, *South Africa*, 293.

²¹¹ De Vos, *South African Judiciary*, 59 and Forsyth, *Time of Crisis*, 26.

²¹² Forsyth, *Danger to Their Talents*, 3 *et seqq.*; Corder, *Judges at Work*, 239.

²¹³ Van Blerk, 1992 *Consultus*, 135-140. See, however, South Africa: HSRC, *1985 Report* and South Africa: *Hoexter Commission Report*, 193. See also Editorial Note, 1991 *Consultus*, 3; Dlamini, *SAJOHR* 4 (1988), 37; Corder, *Stellenbosch LR* 6 (1995), 204-207; Qwelane, *Communities*, 1-12; Motale, *CILSA* 24 (1991), 297; Davis, *SAJOHR* 3 (1987), 229-233. For a mediatory opinion see Ellman, *LSE* 20 (1995), 407-479 who based his conclusions on a number of surveys performed in South Africa in 1981, 1990 and 1993. See also at 423.

²¹⁴ I Mohamed, the present Chief Justice. In 1987 H Mall was appointed acting judge. See 1991 *Annual Survey*, 665-666 and 1986 *Annual Survey*, 560; Chaskalson, *Reshaping*, 14; Motale, *CILSA* 24 (1991), 297 fn86.

²¹⁵ Abel, *Politics*, 19.

²¹⁶ McQuoid-Mason, *Transformation*, 106-108 and Fernandez, *Analysis and Critique*, 116.

²¹⁷ For instance, Durban magistrates had been subjected to video shows at the height of the perceived 'total onslaught' by the secret police. See Abel, *Politics*, 18; McQuoid-Mason, *Transformation*, 105. For other examples see Qwelane, *Communities*, 7-9; ICJ, *Report*, 109-115; Fernandez, *Transformation*, 116.

without trial fostered this impression.²¹⁸ A striking result of this legitimacy crisis was the establishment of so-called community courts during the state of emergency in African townships, which operated outside any political or judicial control.²¹⁹

Little wonder that during apartheid some critics questioned whether liberal judges should continue to lend legitimacy to South Africa's unjust legal system, and proposed that these judges should resign.²²⁰ After the end of the apartheid era, some critics argued that the post-apartheid judiciary should not consist of apartheid's judges.²²¹ To some it seemed doubtful whether a judiciary trained and appointed under the old regime should also rule in the new order. It was thought that White judges would continue to judge according to values inculcated by their social background and training.²²²

Obviously, this view was not accepted. Instead, the judiciary was obliged to take a new oath of office.²²³ The main argument against dismissal was the fear of weakening the administration of justice at a stage when judicial experience was very much needed.²²⁴ Furthermore, this drastic step would have implied that the entire judiciary, from then Chief Justice Corbett to the latest acting judge, had failed to fulfil their task as guardians of justice. As has been pointed out above, even the judiciary's fiercest critics have rejected this conclusion as an oversimplification.²²⁵

This, again, shows how difficult it is to assess objectively the performance of the judiciary during the years of apartheid. To an observer, the performance of South Africa's judiciary has a wave-like pattern. A critical assessment must reflect that the courts' record covers not only internal security or human rights issues, but also many other less controversial ones. It must, further, be pointed out that judges throughout the period since 1910 have successfully continued to shape South Africa's unique mixed legal system. Nevertheless, the area of

²¹⁸ For a detailed overview on the effects the emergency regulations see Mathews, *Freedom*, 192 *et seq.*

²¹⁹ Sachs, *Protecting Human Rights*, 102; ICJ, *Report*, 117.

²²⁰ A heated debate broke out subsequent to R Wacks' provocative thesis in his inaugural lecture in 1983. Wacks, *SALJ* 101 (1984), 268. Response by Dugard in *SALJ* 101 (1984), 286; Corder, *Judicial Branch*, 75. See also Green, 1987 *WLR*, 357-361.

²²¹ For the various proposals see Berat, 1991 *TICLJ*, 204; Hlophe, *SALJ* 112 (1995), 22-24; Motala, *CILSA* 24 (1991), 299-304; Cowling, *SAJOHR* 3 (1987), 187-195; Forsyth, *SAJOHR* 7 (1991), 1-5 and 15-17 and 18 *et seq.*

²²² Motala, *CILSA* 24 (1991), 300-301 and 303-304; Sachs, *Protecting Human Rights*, 95; Hlophe, *SALJ* 112 (1995), 24.

²²³ See s 241 (2A) (7) of the Interim Constitution and Erasmus, *Superior Court Practice*, Service 6, 1996, A2-136 *et seq.*

²²⁴ Chaskalson, *Reshaping*, 13-15.

²²⁵ Corder, *Judicial Branch*, 72-76; Sachs, *Justice in SA*, 144; Ellman, *LSE* 20 (1995), 419.

human rights was where the judiciary's role as independent arbiter was most needed. At some stages, a somewhat liberal spirit seemed at hand; at many others, however, the conservative spirit carried the day.²²⁶ One tends to agree with John Dugard who said he found it easier to identify particular liberal judges than to classify a whole court as such.²²⁷ Certainly, a number of appointments by the executive were strongly executive-oriented, but not all were²²⁸, and there have been liberal judgements even by conservative judges. On the other hand, cases are legion where courts decided against civil liberties. Although the concept of parliamentary supremacy bound the hands of the judiciary, the judicial right to interpretation of the laws should have been, and was not, in numerous decisions, used in favour of disadvantaged members of society.²²⁹

On balance, it is fair to state that under apartheid South Africa's judges struggled under strong positivistic influence to uphold the rule of law.²³⁰ To the degree that the state increased its pressure to retain a racial oligarchy, especially under the state of emergency, the judiciary's impotence and inability to protect individual rights against the state became alarmingly evident.²³¹ The judiciary "...unwittingly aided the development of [a] socio-legal system which ignor[ed] many of the basic principles of justice in South Africa....".²³²

2 THE SHAPING OF THE SOUTH AFRICAN LAW OF DELICT AS A BACKGROUND TO JUDICIAL LIABILITY

The civil liability of judges in South African law is regulated by case law as opposed to statutory law. Case law on judicial liability extends over a period of more than 115 years. This

²²⁶ For a good summary of the courts' records and performance until 1985 see Corder, *Supreme Court*, 97-101.

²²⁷ Dugard, *Human Rights*, 322-323. Although far from being comprehensive, names such as Innes, Centlivres, Schreiner, Corbett, Milne, Didcott or Goldstone come to mind.

²²⁸ Ellman, *Times of Trouble*, 227-229.

²²⁹ "...[C]riticism does not mean...that there are no members of the judiciary who have made a positive contribution to the progressive development of the law - even with the constraints of apartheid. But these remain in a hopeless minority." Kamba, *Future Role of the Judiciary*, 25. Furthermore Dyzenhaus, *Hard Cases*, 167-176, 213-217.

²³⁰ Millner, *CLP* 14 (1961), 300; ICJ, *Report*, 109-115; Cameron, *SAJOHR* 6 (1990), 262.

²³¹ Declared for the second time in July 1985. For an assessment of the courts' activist record during this period see Corder, *Supreme Court*, 104-108; Basson, *SAJOHR* 3 (1987), 28.

²³² Corder, *Judges at Work*, 241. For an overview on the Appellate Division's record in security matters from 1950 to 1989 see Berat, 1991 *TICLJ*, 192-202.

period coincides almost entirely with the emergence of a South African *usus hodiernus* that witnessed, originally, the increasing influence of English legal concepts and, later, the falling back on Roman-Dutch principles. It was particularly the law of delict which, in due course, became the focal point of the well known purist-pragmatist controversy.²³³ It is important to bear in mind that the development of judicial liability reflects, to some degree, the strong influences of English and Roman-Dutch legal concepts on the law of delict.

The South African law of delict is based on three pillars which clearly are not of English origin: the *actiones legis Aquiliae* and *iniuriarum*, which are based on Roman and Roman-Dutch law, and the action for pain and suffering which has, in part, Germanic roots.²³⁴ The *actio legis Aquiliae* is aimed at recovery of damages for patrimonial loss. The *actio iniuriarum* is aimed at the compensation of sentimental loss. The action for pain and suffering comes somewhere in the middle. The *actio legis Aquiliae* and the *actio iniuriarum* were considerably modified in scope in Roman-Dutch law, and even more so in South African law.

It has been shown elsewhere that the history of these actions was one of steady extension and generalisation.²³⁵ It needs to be seen whether this movement towards generalisation continues.²³⁶ New fields have been explored since the late nineteenth century, continuously broadening the scope of Aquilian liability from liability for culpable acts causing physical injury to persons or property to liability for any sort of conduct and harm.²³⁷ There have also

²³³ The related developments have been the subject of numerous treatises, dissertations and articles. For the most recent approach, see Zimmermann and Visser, *Southern Cross*. Further Hosten *et al*, *Introduction*, 352-375; Wille's *Principles of South African Law*, 27-30; Van Zyl, *Regsgeskiedenis*, 443-503; Hahlo and Kahn, *Union*, 17-50 and *Legal System*, 574-596; Spiller, *Making of the Law of Delict*, 335-350; Beinart, *Acta Juridica* 24 (1981), 7 *et seqq*; Schreiner, *Contribution*; Visser, *Legal Historian*, 2 *et seqq*.

²³⁴ Zimmermann, *Römisch-holländisches Recht in Südafrika*, 138; Neethling *et al*, *Law of Delict*, 5.

²³⁵ See above chapter IV 2 and chapter V 3.

²³⁶ De Villiers CJ in *Cape of Good Hope Bank v Fischer* (1886) 4 SC 368 at 376 stated with regard to Voet and Matthaeus: "...that in their time the Aquilian law had received an extension by analogy to a degree never permitted under the Roman law. The action...was extended to every kind of loss sustained by a person in consequence of the wrongful acts of another..." See also *Matthews v Young* 1922 AD 492 at 504. See also Visser's comments on the firm stand Van der Merwe and Olivier have taken in their textbook, see Visser, *Legal Historian*, 6. For the opposite view see *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A); *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A). Critical also is McKerron, *Delict*, 8. Further see Pauw, *De Jure* 8 (1975), 25.

²³⁷ See Hutchison, *Aquilian Liability II*, 595. Examples in this respect are *inter alia* liability for pure economic loss, for negligent misstatements or for omissions. Under the action for pain and suffering reference has to be made to liability for emotional shock and, finally, to the adoption of quasi-delictual liability in the form of vicarious liability of employers for delicts of their employees.

been examples where the courts have pared the law of delict of elements considered obsolete, as in the case of the *amende honorable*²³⁸ or the obligation to surrender an offending animal under the *actio de pauperie*.²³⁹

With regard to the category of quasi-delicts we can observe a similar tendency. The category of quasi-delicts, which has been considered the ‘dogmatical home’ of judicial liability until the seventeenth and eighteenth centuries, was not accepted in the modern South African law of delict. Liability on grounds of the *actio de effusis vel deiectionis* as well as the *actio de posito vel suspenso* only very rarely commanded the attention of the South African courts.²⁴⁰ The liability of the *nauta*, *caupo* and *stabularius* has been absorbed by the concept of vicarious liability²⁴¹; and the tendency of Roman-Dutch lawyers to exclude judicial liability from the group of quasi-delicts for all practical purposes continued in South African law.

As we shall see, in modern South African law, judges are sued either under the *actio legis Aquiliae* or under the *actio iniuriarum*. Consequently, South African jurists avoided the question of the difference between quasi-delictual and delictual liability, which for centuries had tormented so many of their predecessors. One may therefore agree with the statement by Professor Zimmermann concerning quasi-delictual liability in South African law, that – as in most other systems based on Roman law – “...its practical significance was limited. Liability as a rule was based upon fault, and as long as this remained the fundamental precept...it mattered little whether an action was classified as delictual or quasi-delictual.”²⁴²

²³⁸ *Hare v White* (1865) 1 Roscoe 246; *Ward-Jackson v Cape Times Ltd* 1910 WLD 257; *Swart v Lion Bottle Store* 1927 TPD 316. See also De Villiers, *Law of Injuries*, 178; Burchell, *Law of Defamation*, 315-319 and *Personality Rights*, 647; Neethling *et al*, *Law of Delict*, 14; Wille's *Principles of South African Law*, 695; Erasmus, *Interaction*, 159-160.

²³⁹ *O'Callaghan NO v Chaplin* 1927 AD 310.

²⁴⁰ See *Clair v Port Elizabeth Harbour Board*; *Kennedy v The Same* 5 EDC 311; *Marais v Eloff* (1893) Hertzog 138; *Transvaal and Rhodesian Estates Ltd v Golding* 1917 AD 18 27-29; *Colmar v Dunbar* 1933 AD 141; *Bowden v Rudman* 1964 (4) SA 686 (N) 690 (E) - 692 (E). Further Pauw, *THR-HR* 42 (1979), 251; Wille's *Principles of South African Law*, 703; Maasdorp and Hall, *Maasdorp's Institutes*, 5 and Zimmermann, *Law of Obligations*, 1126 *et seq* who, at 1128 quotes from Voet's *Commentary*, vol.II 595 where Gane fittingly states that the title of the *Digest* dealing with quasi-delicts (D 9.3) “...cannot be said to have been of leading importance in South African law.” Further Zimmermann's *Effusum vel Deiectum*, 321.

²⁴¹ See generally Wille's *Principles of South African Law*, 704-707; Neethling *et al*, *Law of Delict*, 352-359; Zimmermann, *Law of Obligations*, 1123-1124.

²⁴² *Ibid.* at 1129.

On the other hand, South Africa's legal system would not be considered a mixed legal system if it were unmarked by common law influences. In this regard, reference is generally made to the British policy of gradualism in Anglicising the legal sphere, which began with the introduction of the First Charter of Justice at the Cape Colony in 1827.²⁴³ Two distinct features of this development may be identified. In the first place, as noted earlier, there were extensive legislative influences. Most of the statutes that were enacted were in virtually identical form to their English counterparts.²⁴⁴ Secondly, a considerable part of English law was received in South Africa not by direct statutory enactment but by somewhat covert and indirect means by judges who were trained almost exclusively in English law and had to apply rules of a legal system they did not really appreciate, or use legal authorities whose language they could hardly speak or read.²⁴⁵ Thus, the conducting of court proceedings in English from 1825 onwards was met with relief.²⁴⁶

All Roman-Dutch legal terms had to be translated. In many cases, however, no precise equivalent was at hand and, thus, those legal terms were used that appeared most likely to match. This, ultimately, led to another consequence: judges' use of English legal terminology on a wide scale opened the door to extensive use of those English legal doctrines that, generally, were related to the relevant terminology.²⁴⁷ Undoubtedly, the judges intended to apply Roman-Dutch law. Increasingly, however, Roman-Dutch law acquired an English character as the judges superimposed layers of English common law.

It has been said that the basis of the South African law of delict was still Roman-Dutch, but its spirit and orientation had become increasingly English.²⁴⁸ However, the formation of the Union in 1910 and the growing national South African (Afrikaner) identity sooner or later also

²⁴³ See above at 1 1 3.

²⁴⁴ Generally Hahlo and Kahn, *Union*, 8-20; Van Zyl, *Geskiedenis*, 455-457; Devenish, *Cape of Good Hope*, 56 refers to an osmosis which offered the greatest threat to Roman-Dutch law. See also above at 1 1 and text at fn31 *et seqq* and below at 2 1 and 2 2.

²⁴⁵ See above at 1 1 3.

²⁴⁶ See Ordinance No 1 of 1825 and No 27 of 1826. Further Dunoon, *SALJ* 70 (1953), 90 *et seqq*.

²⁴⁷ Other mechanisms included the possibility of further appeal to the Privy Council or frequent reference to English cases where English statutes were applied. Generally see Van Zyl, *Geskiedenis*, 454-458; Zimmermann, *Römisch-holländisches Recht in Südafrika*, 13-15; Girvin, *Architects*, 98, 110 and 138 and *Influence*, 223-225, 231 *et seqq*; Bodenstein, *SALJ* 32 (1915) 337 *et seqq*.

²⁴⁸ Boberg, *SALJ* 83 (1966), 165. For a useful and detailed overview on the development of Aquilian liability during the nineteenth century see Van Aswegen, *Aquilian Liability I*, 559-593. With regard to the *actio iniuriarum* see again Boberg, *SALJ* 83 (1966), 158-165 and further Burchell, *Personality Rights*, 640-649.

led to the call for a South African legal identity. It is no exaggeration to say that racial purity which found its place on the political banners soon found its corollary in the quest for purity in South African law.²⁴⁹ At some of the new law faculties, the focus dramatically shifted from English to Roman-Dutch law. Lectures and textbooks dealt exclusively with principles of Roman-Dutch law, and in 1937 the *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* was founded as an Afrikaans legal medium for the cultivation of Roman-Dutch law.

In due course, this led to a confrontation with those who adhered to the *status quo*. Soon an academic war, a *bellum juridicum*, was declared, which raged between purists²⁵⁰ and pollutionists, i.e., between antiquarians and pragmatists.²⁵¹ However, it was not until the rise of a new generation of lawyers whose legal education and professional careers had already come under considerable purist influence that the courts themselves began to purge various fields of law of such English influences as were considered superfluous.²⁵² This development reached its climax between 1950 and 1970, the first two decades after Afrikaner Nationalists came into power. This period saw the abolition of final appeal to the Privy Council in 1950 and South Africa's leaving the Commonwealth in 1961. During this period, the relationship between the Appellate Division and the executive became increasingly harmonious. Legal purism undoubtedly had a strong political connotation.

Today it may be said that a pragmatist approach prevails. South African legislation, and precedents are accorded prime authority. Beyond these, Roman-Dutch law is an authoritative source, whereas English law is a persuasive one. This rule, however, must always be seen in the specific context of the legal case in question.²⁵³ To a degree, at least in the law of delict, the purist-pragmatist controversy has helped to clarify and develop the law in new fields. Or

²⁴⁹ Fagan, *Historical Context*, 61.

²⁵⁰ Some prominent purists are I van Zijl Steyn, D Pont, J C De Wet, T Price, LC Steyn, FP van den Heever, WA Joubert, NJ van der Merwe.

²⁵¹ Some prominent pragmatists are B Z Beinart, H R Hahlo, E Kahn, O D Schreiner, G M Holmes, PQR Boberg, JC van der Walt.

²⁵² Here reference has to be made particularly to LC Steyn, who, years before he was appointed to the Bench, indicated in his *Uitleg van Wette* (1946) how great his hostility was to the undue influence of English law in South Africa. Undoubtedly this view also guided Steyn during his judgeship. See for instance *Trust Bank van Afrika, Bpk. v Eksteen* 1964 (3) SA 402 (A) 410-411. For a critical view on LC Steyn's impact on South African law, see Cameron, *SALJ* 99 (1982), 38.

²⁵³ Zimmermann, *Roman Law in a Mixed Legal System*, 51-52, *Römisch-holländisches Recht in Südafrika*, 39-41; Van Zyl, *Geskiedenis*, 478-494; Spiller, *Making of the Law of Delict*, 344.

as Professor Hutchison once aptly described it: “Fortunately...the war of words, unpleasant as it was, generated not only heat but also a great deal of light...”.²⁵⁴

For a better background to the subject of the delictual liability of judges, attention should be paid, apart from these general remarks, to two issues: the emergence of the concept of wrongfulness under the *actio legis Aquiliae* and the problematic relation between malice and *animus iniuriandi* under the *actio iniuriarum*. The development of judicial liability in modern South African law to a large extent relates to the development of both concepts. To wrongfulness, because judicial liability nowadays is a question of wrongfulness and the application of policy considerations. To malice, because malice or improper motive, from the first days of its application to the liability of judicial officers, provided for considerable confusion and entanglement.

2 1 The emergence of the concept of wrongfulness

By the end of the nineteenth century, in the South African law of delict, as in Roman-Dutch law, wrongfulness or *iniuria* had not yet been identified as a distinct element for delictual liability apart from damage, causation and fault.²⁵⁵ On the other hand, growing common law influences witnessed the acceptance by the courts of the so-called duty of care.²⁵⁶ The duty of care concept was regarded in English law as a necessary element in negligence, emerging from the courts’ reluctance to grant liability for negligent conduct in every situation.²⁵⁷ By the end of the first half of this century, the concept had established itself well in South African law. It operated on two distinct levels, which Millner described as follows:

“At one level it is *fact based*, at another it is *policy based*. The fact-based duty of care forms part of the inquiry whether the defendant’s behaviour was negligent in the circumstances. The whole inquiry is governed by the *foreseeability test*. On the other hand, the policy-based...duty of care is...basic to the development and growth of negligence and determines its scope, that is to say, the range of relationships and interests protected by it. Here it is a concept entirely divorced from foreseeability and governed by the policy of the law.”²⁵⁸

²⁵⁴ Hutchison, *Aquilian Liability II*, 597.

²⁵⁵ Van Aswegen, *Aquilian Liability I*, 568-571.

²⁵⁶ Price, *SALJ* 66 (1949), 174.

²⁵⁷ Hutchison, *Aquilian Liability II*, 599. The doctrine was firmly established in *Heaven v Pender* (1883) 11 QBD 503. See Price, *SALJ* 66 (1949), 179.

²⁵⁸ Millner, *Negligence*, 230. My italics.

Nonetheless, in South Africa, criticism of the duty of care concept rose steadily over the years. In *Perlman v Zoutendyk*, one of the early cases in the field of pure economic loss, Watermeyer J for the first time expressed discomfort with the strong influence of English law in this field of the law of delict:²⁵⁹

“Roman-Dutch law...approaches a new problem in the continental rather than the English way, because in general all damage caused unjustifiably (*iniuria*) is actionable, whether caused intentionally (*dolo*) or by negligence (*culpa*).”

The reactions to this decision were very much divided.²⁶⁰ Undoubtedly, the whole issue coincided increasingly with the general tendency in these mid-century decades to reconsider the influence and infiltration of English law in modern South African private law. Some took the view that fault (*culpa*) in the wide sense was sufficient to control boundless liability. In their eyes, *iniuria* was a rather primitive notion, and duty of care a confusing, ambiguous and tautologous concept – a useless repetition of the foreseeability test that already applied under the *culpa* requirement.²⁶¹

Others defended the duty of care. They argued that the critics were unaware of its implications, namely that it contained two distinct purposes, one of which (the policy-based level) bore some connotation of wrongfulness.²⁶² However, in due course, the majority of writers came to consider the duty of care ambiguous. Rightly so, since the telescoping of the tests for *iniuria* and *culpa* created considerable confusion.²⁶³ This dealt a severe blow to the concept of duty of care, from which it recovered only in modified form.

While wrongfulness gained ground, it soon became evident that the criterion of wrongfulness had to be defined more accurately. The group of authors who rejected the duty of care concept in its entirety defined wrongfulness as the infringement of a legal subjective right (*subjektiewe reg*).²⁶⁴ Four categories of such rights were identified.²⁶⁵ In the eyes of some writers, the

²⁵⁹ 1934 CPD 61 at 64.

²⁶⁰ Hutchison, *Aquilian Liability II*, 616.

²⁶¹ Price, *THR-HR* 13 (1950), 261 and *Acta Juridica* 2 (1959), 127.

²⁶² McKerron, *SALJ* 69 (1952), 189. In McKerron's view assistance was generally to be derived from English and American rather than from Roman-Dutch sources. Boberg, *SALJ* 83 (1966), 150 quotes McKerron's preface to the first edition of his *Law of Delicts* (1933).

²⁶³ Were two foreseeability tests truly necessary? A useful overview is contained in Boberg, *Delict*, 35.

²⁶⁴ W A Joubert is generally regarded as the father of this doctrine. See his article *THR-HR* 21 (1958), 12 *et seq* and 98 *et seq*. See also Van der Merwe and Olivier, *Onregmatige Daad*, 54 *et seq*; Neethling *et al*, *Law of Delict*, 43 *et seq*.

²⁶⁵ Namely real rights, personality rights, personal rights, immaterial property rights. Neethling in *THR-HR* 50 (1987), 316-324 identified personal immaterial property rights as a fifth group of subjective rights. In the view of these writers, a legal

doctrine of subjective rights correctly shifted the focus from the defendant (could he foresee the consequences of his act?) to the plaintiff (what were the consequences for his interests?). The doctrine of subjective rights did not prevail, however, and those who favoured it were not as far as they thought from the position they had left behind, for right and duty are related concepts.²⁶⁶ After the smoke had settled, the courts adopted a mediatory approach.

Although the courts by no means hastened to throw overboard the old duty of care concept,²⁶⁷ important decisions were, sooner or later, based on a modified approach towards wrongfulness. A landmark decision, not only in the field of omissions, was the 1975 decision *Minister van Polisie v Ewels*.²⁶⁸ In *Ewels*, policy considerations led the Appellate Division to expand liability for omissions.²⁶⁹ Wrongfulness emerged as an important element whereby the courts weighed policy considerations against the threat of boundless expansion of liability. *Ewels* is also remarkable for the fact that Rumpff CJ made use of the so-called concept of legal duty.²⁷⁰ In the words of Boberg, legal duty was a first cousin to the duty of care and had the advantage „...of an impeccable ancestry...”.²⁷¹

In *Ewels*, thus a dualistic approach emerged: a *prima facie* wrongful act was considered an infringement of a legal right; on the other hand, in those areas of Aquilian liability, for instance omission or pure economic loss, where no *prima facie* infringement of a legal right existed since there is no general duty to prevent loss to another by a positive act, or a general duty to prevent pure economic loss, the existence of a legal duty is essential to determine

right is infringed when the relationship between the holder of a right and the object of the right has been affected in a legally non permissible manner. See also Neethling *et al*, *Law of Delict*, 47.

²⁶⁶ Or as Boberg aptly stated “...finding that [a] right existed implies that the defendant had a legal duty not to infringe it.” Boberg, *Delict*, 32.

²⁶⁷ *SAR & H v Marais* 1950 (4) SA 619 (A); *Herschel v Mrupe* 1954 (3) SA 464 (A). Note, however, the *dictum* by Van den Heever JA who was the only one of the five judges to stress that in fact negligence was not the only requirement on which Aquilian liability was based but that *iniuria* “...remained throughout...” (at 487 D-E). For a critical discussion, see Mulligan, *SALJ* 71 (1954), 321-323. Further see the *dictum* by Schreiner JA in *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A) 585.

²⁶⁸ 1975 (3) SA 590 (A). Historically preceded by Steyn JA’s minority judgement in *Silva’s Fishing Corporation (Pty) Ltd v Maweza* 1957 (2) SA 256 (A) and the decision in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A); *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A). For a discussion of developments in the field of omissions, see Hutchison, *Aquilian Liability II*, 624-627.

²⁶⁹ Note, however, that some authors hold that liability for omissions still does not generally exist. See Hutchison, *Aquilian Liability II*, 604-609.

²⁷⁰ See Boberg, *Delict*, 231.

²⁷¹ *Ibid.* at 37.

wrongfulness.²⁷² This development culminated in *Administrateur, Natal v Trust Bank van Afrika Bpk.*²⁷³ Here, the element of wrongfulness was, once and for all, identified as a distinct element of Aquilian liability, not to be confused with fault.

Although the original concept of duty of care was considered “...’n *onding in ons gemene reg*...”²⁷⁴, the concept of legal duty or *regsplig* was thought to be necessary to determine the boundaries of wrongfulness in specific cases.²⁷⁵ It follows that the breach of a legal duty or the infringement of a legal right are not distinct alternatives in the consideration of wrongfulness, but “...alternative *paths* to the policy conclusion that the wrongfulness requirement compels, the one or the other seeming more comfortable in the circumstances.”²⁷⁶ Wrongfulness, therefore, was identified as the key for the courts to prevent the spread of delictual liability beyond reasonable bounds.

2.2 The emergence of the concept of malice

A second aspect, now under the *actio iniuriarum*, that deserves attention is the relation between malice and *animus iniuriandi* and the emergence of a number of common law justification grounds in modern South African law. Few other topics have aroused more debate in the South African law of delict than the role of *animus iniuriandi*. To a degree, this debate also affected the development of judicial liability, and a considerable share of the confusion which prevailed for decades in this respect was owing to the English concept of malice. Once again the dissension that arose in regard to the law of delict during this century must be seen against the background of the conflict between purists and pollutionists. Ironically, something which has never been at issue under the *actio legis Aquiliae*, namely the exclusion of fault (or *animus iniuriandi*) as a requirement for liability, became the main issue here.²⁷⁷

²⁷² This is explained unequivocally by Neethling *et al*, *Law of Delict*, 49. See also Wille's *Principles of South African Law*, 648; Hutchison, *Aquilian Liability II*, 634.

²⁷³ 1979 (3) SA 824 (A).

²⁷⁴ *Ibid.* at 833.

²⁷⁵ *Ibid.* at 833-834. See also *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T).

²⁷⁶ Boberg, *Delict*, 32.

²⁷⁷ It serves as a colourful example of the chaotic process of assimilation of Roman-Dutch and English legal concepts that under the *actio legis Aquiliae* fault was never questioned, whereas under the *actio iniuriarum* it very much was. Under the

By the second half of the nineteenth century, South African courts increasingly relied on English defences like truth, fair comment and, particularly of course, privilege, to rationalise the ostensibly similar Roman-Dutch justification grounds, whose conceptual arrangement they had barely managed to grasp.²⁷⁸ As in so many other cases, the adoption of English legal terminology in this field resulted in an acceptance of the underlying common law doctrine almost in its entirety: South African justification grounds to no small degree became one with English common law principles and lost their typical Roman-Dutch connotations.

Once the defendant's conduct had been justified by one of the existing defences, it was no longer considered *prima facie* unlawful. Hence, the common law justification grounds became directed against wrongfulness and, unlike the Roman-Dutch defences, no longer against fault or *animus iniuriandi*. This inevitably led to the introduction of a more objectively based approach to liability. When, finally, the South African courts began to treat these common law defences as *numerus clausus*, it became evident that the subjective concept of *animus iniuriandi* had become a "...hollow fiction."²⁷⁹

The prevailing tendency to replace the subjective elements in the law of defamation was boosted not only by the introduction of a *numerus clausus* of defences, but by the dubious equation of fault or *animus iniuriandi* with malice. In Roman-Dutch law, *animus iniuriandi* was accepted as the gist of an action for *iniuria*.²⁸⁰ However, as early as the middle of the nineteenth century, South African courts began to equate the typically English principle of malice with the Roman-Dutch principle of *animus*, precisely in the manner that has been outlined above.²⁸¹ In doing so, the courts overlooked the fact that in English law malice played an entirely different role from that of *animus iniuriandi* in Roman-Dutch law.²⁸² Malice was indicative always of an improper motive, but certainly not of fault. Therefore, malice was never as decisive in the determination of delictual liability as was fault in Roman-Dutch law. In English law, malice was merely indicative of what was necessary to overcome

former, wrongfulness occasioned great pain; under the latter it was hardly worth dispute. In a sense, this ambiguity also indicates the underlying lack of principle in the English law of torts.

²⁷⁸ Boberg, *SALJ* 83 (1966), 158-165.

²⁷⁹ McKerron, *SALJ* 48 (1931), 172.

²⁸⁰ See chapter V 3 fn 114-137 and 5 2 1. The phrase was coined by Schreiner JA in *Basner v Trigger* 1946 AD 83 at 94. Furthermore see Boberg, *Defamation*, 38; Boberg, *SALJ* 83 (1966), 158-165; Burchell, *Principles*, 640-649.

²⁸¹ See above at 1 1 3 fn 98-99.

²⁸² See text above at chapter V 3 before fn 137.

certain of the above mentioned defences. However, after *animus iniuriandi* was pushed aside by the courts, malice, at least as indicative of an improper motive, was the sole subjective concept that retained some relevance in the law of defamation, even though it was hardly comparable with *animus iniuriandi*, which above all depicts the will and *never* the motive behind the will.²⁸³

The turning point, however, came in 1960 when in *Maisel v Van Naeren* it was held that English legal principles had not ousted Roman-Dutch law.²⁸⁴ *Animus iniuriandi* was restored as an essential requirement for liability under the *actio iniuriarum*. A defendant was no longer bound by a *numerus clausus* of grounds of justification to rebut the *prima facie* presumption of wrongfulness or *animus iniuriandi*.²⁸⁵ The decision in *Maisel* was confirmed by a series of three decisions, which culminated in 1977 in *SAUK v O'Malley*.²⁸⁶ Today, the distinction between wrongfulness and fault is well established. As a consequence of this new approach malice lost its unfortunate influence and was downgraded to play a minor role as a means available to a plaintiff to rebut a number of defences.

2 3 Conclusion

In summary, it may be said that delictual liability in South Africa is based on a generalising rather than on a casuistic approach. It is a system based on principles. Therefore, its foundation is in civil law and it is rightly considered a law of delict rather than a law of delicts.²⁸⁷ Delictual liability entails compensation for harm wrongfully and culpably inflicted and consists of five distinct elements, namely an act, wrongfulness, fault, damage and causation, which must be present before delictual liability can arise.²⁸⁸ For the determination of wrongfulness, generally the *boni mores* or the legal convictions of the community serve as

²⁸³ Ranchod, *Foundations*, 133-134 and 137-138.

²⁸⁴ 1960 (4) SA 836 (C) *per* De Villiers and Banks AJJ. See Boberg, *Defamation*, 40-48.

²⁸⁵ *Clarke v Hurst* 1992 (4) SA 630 (D) 650.

²⁸⁶ 1977 (3) 394 (A). The above-mentioned trias of landmark decisions were *Jordaan v Van Biljoen* 1962 (1) SA 286 (A); *Craig v Voortrekkerpers Bpk* 1963 (1) SA 149 (A); *Nydoo v Vengtas* 1965 (1) SA 1 (A).

²⁸⁷ See the title of McKerron's first edition of his standard work: *The Law of Delicts*.

²⁸⁸ Van der Walt, *Delict*, 2 *et seqq*; Boberg, *Delict*, 24-26; Neethling *et al*, *Law of Delict*, 4; Van der Merwe and Olivier, *Onregmatige Daad*, 24; Wille's *Principles of South African Law*, 645-659; Burchell, *Principles*, 9.

the main criterion.²⁸⁹ Thus, wrongfulness is determined by balancing all those various constitutional, social, moral, economic or legal policy factors that are at stake in the particular case.²⁹⁰ Generally, the test is objective. It applies *ex post facto*. However, as already indicated, in certain circumstances subjective factors (eg. malice) lying within the sphere of the defendant may also have relevance in regard to the determination of wrongfulness.²⁹¹ With an eye on the dogmatical foundation of the concept the influence of subjective factors frequently is discussed under the doctrine of abuse of right.

It is, furthermore, important to distinguish improper motive or malice from fault. With some exceptions, liability in delict will arise only if fault exists. Two forms of fault are identified: intention (*dolus*) and negligence (*culpa*). Fault, unlike wrongfulness (apart of course from the concept of the reasonable man that applies specifically to the determination of negligence) is a subjective concept. It refers to the reprehensible state of mind or conduct of someone. Improper motive is a different subjective concept, which entails a reprehensible purpose or objective behind the will of the defendant.²⁹²

The defendant may rebut the presumption of wrongfulness by showing the applicability of a justification ground. Relatively late, in *Wentzel v S.A. Yster en Staalbedryfsvereniging*, for the first time a clear-cut distinction was drawn between defences against wrongfulness and defences against fault, which is in accordance with the two distinct elements of delictual liability.²⁹³ Hence, defence, necessity, provocation, consent to injury, statutory authority, official capacity and power of chastisement are accepted as traditional grounds of justification excluding wrongfulness under the *actio legis Aquiliae*, and truth, public benefit, privilege and fair comment are additional justification grounds under the *actio iniuriarum*.²⁹⁴

²⁸⁹ Wille's *Principles of South African Law*, 648; Boberg, *Delict*, 33. For a more diversified approach see Neethling *et al*, *Law of Delict*, 31-43.

²⁹⁰ Boberg, *Delict*, 33; Wille's *Principles of South African Law*, 649.

²⁹¹ Most often instances that fall within the ambit of neighbour law or in relation to cases of pure economic loss or omissions. See for further references, Neethling *et al*, *Law of Delict*, 37-38. Neethling rightly stresses the point that improper motive (often referred to as malice) may not be confused with intent. See also Boberg, *Delict*, 32 and 38-39.

²⁹² Neethling *et al*, *Law of Delict*, 38; McQuiod-Mason, *Law of Privacy*, 104.

²⁹³ 1967 (3) SA 91 (T). See further *SAUK v O'Malley* 1977 (3) SA 394 (A) and Boberg, *Defamation*, 48 *et seq.*

²⁹⁴ See right below at 3.1 for more details.

3 JUDICIAL LIABILITY IN THE SOUTH AFRICAN LAW OF DELICT

3.1 Introduction

On the 27, 28 and 29 October 1997, the Truth and Reconciliation Commission (TRC) heard oral testimony on what it considered relevant activities of judicial officers, other public servants involved in the judicial process, legal practitioners and legal academics during the apartheid years from 1 March 1960 to the cut-off date of 10 May 1994. Even though the judges refused to give oral evidence, a number of judges responded positively to the invitations of the TRC in August 1997 and prepared written representations concerning the involvement of the judiciary. One year earlier, then Chief Justice Mr Justice M M Corbett responded to a presentation by Mr Krish Govender entitled *Injustice under Apartheid Judiciary* that suggested that judges who held office prior to April 1994 should be held accountable for their conduct. In dealing with Mr Govender's proposals, the former Chief Justice said:

"I am opposed to this suggestion [holding the judiciary accountable for their conduct during the apartheid era], basically for two reasons. In the first place it is not practically feasible. In order to determine whether Judge X had allowed justice to be subverted in some alleged manner in a particular case, the TRC would in effect have to retry the case: read the record of the proceedings (often very long) and determine...whether or not Judge X came to the correct conclusion or not, and, if not, whether this was due to some improper factor or reason. The mind boggles at what all this would involve. The impracticality of it all is manifest.

But there is a more important, a more fundamental, objection to this suggestion. This has to do with the principle of judicial independence...In order to be true to his judicial oath and to administer justice to all persons alike „without fear, favour or prejudice” a judge must enjoy independence from the legislature, from the executive...Various constitutional provisions underpin such independence: for example, the appointment of judges for life...; a prohibition on the reduction of their salaries; security of tenure of office...This does not mean that a judge is not accountable or above the law. He is accountable to a superior court of appeal; he performs his duties openly and in public...and in the last resort there is impeachment. Outside these parameters, however, a judge may not be called upon to account for his or her judgements...”²⁹⁵

On reading this statement, the question that immediately comes to mind is whether the Chief Justice's omission of judicial liability as another means of accountability was merely a lacuna on his part or whether his statement reflects the taboo status of judicial liability.²⁹⁶ In the words of the former Chief Justice in the first paragraph of the quote, 'the mind boggles' at what holding a judge accountable would involve. However, the requirements he refers to are precisely those that have to be met at present to hold a judge delictually liable in South African law: First,

²⁹⁵ See *SALJ* 115 (1997), 20. For a critical account of the TRC hearings see most recently Dyzenhaus, *Judging the Judges*.

²⁹⁶ A similar example is provided by the comments of Froneman J in *Matiso v Commanding Officer, Port Elizabeth Prison, & another* 1994 (4) SA 592 (SE) at 598.

determination of a wrong judgement and secondly, determination of the relevant state of mind, that is improper motive. This notwithstanding, the former Chief Justice considered the 'impracticality' of it all as manifest.

These comments of the former Chief Justice fail to surprise. From discussions at various times with South African judges and legal academics, there emerges the widespread belief that to sue a judge in South Africa is, to say the least, impossible. In a sense, one is confronted here with what has been referred to above as the 'aura of infallibility' surrounding the South African judiciary. Surprisingly, this persists despite the clear regulation of the delictual liability of judicial officers in South African law.

It is true that a number of models of judicial liability referred to in the general introduction to this thesis are not adopted by South African law.²⁹⁷ For example, direct liability of the state for its judges does not exist. In addition, since the judiciary is not subject to legislative or administrative control, the master and servant relationship required for vicarious liability cannot be established. In South African law, as in Roman law, in the Italian *ius commune*, in Roman-Dutch law, and to some extent in English law, judicial liability is exclusively personal liability in delict.

One reason for the amazement of South African judges when confronted with the idea of judicial liability might be that to date, the threat of delictual liability can hardly be said to have been put into effect. In fact, not a single superior court judge has been held delictually liable since 1652. However, this does not mean that there are no principles by which superior court judges could be held liable. Principles of judicial liability can be deduced from about a dozen reported cases which deal with the judicial liability of inferior court judges, from cases that deal with the judicial process as such and, of course, from the application of general principles of the law of delict.

It should be noted that the rationales underlying judicial liability apply to superior and inferior court judges alike. To avoid ambiguity, reference will be made, generally, to liability of judicial officers, which includes liability of superior court judges. As we will see at a later stage, this principle needs to be qualified with regard to procedural aspects of liability of judicial officers.

²⁹⁷ See *De Villiers v Minister of Justice* 1916 TPD 463; *Smith v Union Government* 1933 AD 363; *Swarts v Minister of Justice* 1941 AD 181.

There, superior court judges enjoy a special privilege which is not shared by their brethren in the inferior courts.

Depending on the nature of the infringement suffered, the injured party may institute an action under any of the main delictual actions, i.e., the *actio legis Aquiliae*, the *actio iniuriarum* or the action for pain and suffering. Consequently the generally accepted elements of liability must be met. Nonetheless, it might be useful to spell out these elements in more detail by paying specific attention to the requirements for judicial liability.

Judicial liability requires conduct, on the part of the judicial officer which has caused damage or harm to another. This might be in the form of infringement of personality rights, i.e., *corpus* (eg., order of sterilisation), *fama* (eg., defamation in court), *libertas* (eg., deprivation of liberty) or *dignitas* (eg., humiliation in court). It might also cause patrimonial loss in consequence of an order or a judgement, i.e., by causing irreparable loss (eg., enforced warrant of execution) or additional costs of appeal or review.

Furthermore, there must be fault. Generally the judicial officer must have acted deliberately, although it might well be asked whether or not negligent conduct should be actionable, too.

The availability of justification grounds usually prevents the judicial conduct from being considered wrongful. Nonetheless, the question that arises is when the judicial officer's protection will be lost. At this stage it is necessary to distinguish between cases of defamation or insult by an officer and those cases that depend on an order or a judgement. In the former, the conduct is wrongful and the justification ground (here generally referred to as qualified privilege) is forfeited when the judicial officer was actuated by an improper motive. In the latter, namely cases of patrimonial loss and deprivation of liberty, two conditions must exist before the protection of the justification ground (here referred to as official capacity) is lost: the

judgement/order must be wrong in law or fact; secondly, the judgement/order must be made with a particular state of mind not identical with fault (intention), i.e., improper motive.²⁹⁸

Delictual liability of judicial officers in South African law, therefore, is, above all, a question of the availability of justification grounds. Two aspects in this respect call for specific comment. First, it is surprising that South African courts and legal academics have by and large omitted to deal with the important question of when a judgement is wrong in law or fact. A likely reason (among others²⁹⁹) for this lack of attention is that South African courts have rarely been called upon to decide such questions. There is only one recent case that deals in detail with judicial liability for wrongful imprisonment.³⁰⁰ Meanwhile, there has not been a single decision ever on the question of liability for patrimonial loss in consequence of wrongful misjudgements by superior or inferior court judges. The considerable lack of terminological and substantial clarity in this area will be discussed in due course. Reaching clear definitions has two objectives: to provide a constitutionally acceptable definition of wrong judgements and to use this for a critical assessment of the present South African law of judicial liability.

Secondly, notwithstanding the distinction between the two justification grounds of qualified privilege and official capacity, the tendency has been to include both justification grounds in one generic term: public office.³⁰¹ It has been argued that in the case of judicial officers qualified privilege has the same requirements, scope and consequences as the justification of official capacity.³⁰² For reasons that will be explained in due course, this thesis favours a mixed approach.

²⁹⁸ Apart from the dubiousness of recoverability of economic loss generally, it is essential to note in this respect that to this day there has not been a single decision by South African courts on the specific liability of judges (of superior or inferior courts) under the *actio legis Aquiliae* for economic loss. *Matthews v Young* and *The Cape of Good Hope Bank v Fischer* dealt exclusively with the liability of so-called quasi-judicial bodies and provided for nothing except presumptions with regard to a legal classification of economic loss caused by judgements of ordinary courts. (See below at 3.3). Therefore, there has never been an exact terminological definition by the courts or in the literature of the legally acceptable categorisation of the wrongful causing of economic loss by a judicial decision. For the purposes of this thesis, and in analogy to the clearer field of wrongful imprisonment by judicial officers, such cases will be referred to as wrongful misjudgement. Wrongful misjudgement and wrongful imprisonment have one thing in common: the individual suffers from a wrong decision by a judicial officer. Consequently, while aspects of the underlying 'judicial mistake' are discussed, both instances will be included in the category of wrong judgement.

²⁹⁹ See below at 3.5.1 and 3.5.2.2 (a).

³⁰⁰ *Moeketsi v Minister van Justisie en 'n Ander* 1988 (4) SA 707 (T).

³⁰¹ See for instance Midgley, *Delict*, 75.

³⁰² *Ibid.* at 82.

For practical reasons, in what follows, the development and the present law of judicial liability will be analysed by paying particular attention to those fields where South African courts have already been called upon to decide on questions of judicial liability.

Therefore, infringements of personality rights or, more precisely, for defamation in court will be discussed first. It appears that the courts have given priority to this area. Distinguishing features of judicial liability for infringement of personal liberty and patrimonial loss are easier to depict against the background of liability for infringements of *fama*. This is followed by an analysis of the law of civil liability of so-called quasi-judicial bodies and, thereafter, a critical assessment of the present law of judicial liability in the light of the new constitutional dispensation and a different interpretation of the historical Roman-Dutch authorities.

3 2 Judicial liability for infringements of personality rights

3 2 1 Liability for defamatory remarks made in the course of judicial proceedings

3 2 1 1 Bosman v Bisset

In 1881, for the first time, a South African court was called upon to determine the liability of a judicial officer for defamation in court under the *actio iniuriarum*.³⁰³ *Bosman v Bisset* dealt with the allegation of defamatory remarks made by a magistrate against a prospective witness who appeared to have been drunk. On re-reading the case, it is illuminating to note that all but one of the authorities quoted by counsel were English cases.³⁰⁴ Advocate Upington, who appeared for the plaintiff, argued exclusively along the lines of the English doctrine of judicial privilege. In his eyes, the defence of privilege of judicial proceedings raised by the defendant could not be upheld since the magistrate had uttered his slanderous remarks without having jurisdiction. Therefore, he argued, Bisset had acted *coram non iudice* and had lost the protection of privilege. It should be noted, however, that Upington was wrong not only in applying purely English doctrines to the case; it appears that he also confused the doctrine of immunity from suit with

³⁰³ *Bosman v Bisset* (1881) 1 SC 319.

³⁰⁴ For instance *Scott v Stansfield* (1868) LR 3 Ex. 220 and *Fray v Blackburn* (1863) 3 B & S 576. See above chapter VI 3 2 1 3 and 4 2.

absolute privilege. It has been shown earlier that in English law want of jurisdiction was totally irrelevant to the question of whether absolute privilege applied or not.³⁰⁵

De Villiers CJ firmly rejected counsel's argument. He was not prepared to even consider whether or not the magistrate had acted within the scope of his jurisdiction, since he rejected outright any application of the English concept of absolute privilege. Instead, he insisted on basing his approach on Roman-Dutch law, more particularly on Voet's comments on *D* 47.10.2.³⁰⁶ This introduced into the discussion for the first time the concept of the *bona fides* of the judicial officer. De Villiers CJ interpreted Voet in the sense that liability did not arise as long as the judicial officer acted with the "...*bona fide* object of upholding the dignity of his office...". This implied that where a party was exposed *mala fide* to hatred and disgrace "...an action for injury will lie."³⁰⁷ On the basis of the facts of the matter before him, De Villiers CJ was convinced that Bisset had acted *bona fide* and consequently rejected Bosman's claim.

It is ironical that De Villiers CJ's Roman-Dutch approach was not entirely dissimilar, in its ultimate effect, from the English concept of qualified privilege, something to which he himself drew attention:

"Of all forms of privilege allowed by the English law to the free utterance of opinion, the privilege enjoyed by persons acting in a judicial capacity is the greatest. By our law also a similar privilege exists, although *perhaps to a different degree*. That there is *a limit to the freedom of comment* which Judges and Magistrates enjoyed under the Civil Law is clear from all the authorities."³⁰⁸

Thus, notwithstanding the learned judge's noteworthy insistence – contrary to the trend at the time – on applying Roman-Dutch law rather than English law, his judgement actually laid down the foundation for the subsequent assimilation of the doctrine of qualified privilege into the South African law relating to judicial liability for defamation. De Villiers CJ managed to expel the ghost of the English doctrine of judicial liability through the front door and at the same time opened the back door to qualified privilege and its companion, malice or *mala fides*.

There is another interesting aspect to De Villiers CJ's judgement. In that it accepts the defence of qualified privilege but not absolute privilege, the judgement makes it abundantly clear that, as has been the case throughout its history, the scope of judicial liability is determined to a large extent by considerations of public policy:

³⁰⁵ See above at chapter VI 4 2 3.

³⁰⁶ See above at chapter V 5 2 1.

³⁰⁷ *Bosman v Bisset* (1881) 1 SC 319 at 323-324.

³⁰⁸ *Ibid.* at 323. My italics.

“It is the clear policy of our law...to impose no unnecessary fetters upon the freedom of Judges and Magistrates to comment upon all cases brought judicially before them, and upon the conduct of all persons concerned in those cases.”³⁰⁹

3 2 1 2 Clark v Gadd

Some 31 years were to elapse before the next significant case on judicial liability for defamation. In *Clark v Gadd*³¹⁰, the Eastern District Local Division was called upon to ~~upon to~~ decide whether a magistrate was liable for damages for slander he was alleged to have uttered in court. In rejecting the action, Sheil J interpreted *Bosman v Bisset* as laying down that, in the absence of proof of malice or improper motive, a judicial officer enjoyed the protection of immunity from suit, in the form of the defence of qualified privilege.

The judgement in *Clark* is noteworthy for a number of reasons. Firstly, because it clearly illustrates to what extent the influence of English law had grown since the decision in *Bosman*. Contrary to the approach of De Villiers CJ in the latter case, Sheil J made no attempt to discuss the relevant Roman-Dutch authorities, and showed far less hesitation in adopting and applying the doctrine of qualified privilege. Secondly, the judgement affords a typical example of the blending of Roman-Dutch and English legal concepts in the formative period of modern South African law. Sheil J referred to both malice and *animus iniuriandi* as ways of forfeiting qualified privilege, clearly considering the two concepts to be identical.³¹¹ As pointed out earlier, this view was not an unusual one in the early part of this century. Finally, there being as yet no clear distinction drawn between unlawfulness and fault, the judgement does not specify what element of liability is defeated by the defence of qualified privilege.

Subsequent cases dealing with the concept of qualified privilege did not concern judicial officers but other persons involved in judicial proceedings: advocates, attorneys, witnesses and litigants.³¹²

³⁰⁹ *Bosman v Bisset* (1881) 1 SC 319 at 322.

³¹⁰ 1910 EDL 278 at 282.

³¹¹ *Ibid.* at 283.

³¹² See *inter alia* *Preston v Luyt* 1911 EDL 298; *Briscoe v Benson* 1914 TPD 598; *Findlay v Knight* 1935 AD 58; *Gluckman v Schneider* 1936 AD 151; *Basner v Trigger* 1946 AD 83. On liability of advocates and attorneys see generally the work by Midgely, *Lawyers' Professional Liability*.

3 2 1 3 May v Udwin

In 1981, in the now leading case of *May v Udwin*, exactly 100 years after De Villiers CJ gave his landmark judgement in *Bosman v Bisset*, the Appellate Division was finally confronted with the question of judicial liability for defamation under the *actio iniuriarum*. The Court seized the opportunity to clarify the law by revamping it along the lines on which liability for defamation has been developed since the 1960s.

The facts of the case are as follows: an attorney, one Udwin, sued a magistrate, May, for defamation under the *actio iniuriarum*.³¹³ Allegedly, the magistrate, without giving reasons, had published the defamatory statements in a written judgement of a case where Udwin had appeared before him.³¹⁴ In the Cape Provincial Division, Van Winsen J found for the plaintiff and awarded Udwin R1 000 damages for defamation. Van Winsen J held that three factors would be sufficient to rebut the qualified privilege of judicial officers: first, if the statement uttered were irrelevant to the proceedings. Secondly, if the judicial officer did not act reasonably in his use of words. Thirdly, if the judicial officer acted with malice.³¹⁵ Van Winsen J was convinced that the magistrate had lost the protection of his judicial privilege since no reasonable grounds existed for him to publish the defamatory statements in the written judgement. The court came to the conclusion that May's conduct was attributable "...not so much to maliciousness directed at the plaintiff personally but to an ill-considered and uncalled-for officiousness on his part assayed without a proper regard for all the relevant matter in issue before him."³¹⁶

On appeal, since nothing else was disputed, the Appellate Division was called upon merely to decide whether the magistrate had indeed lost the protection of his judicial privilege.³¹⁷ As the following discussion shows, the Appellate Division's decision in *May v Udwin* brought light not only to the field of judicial liability, but also to the law with regard to the broader area of the role and exact scope of the justification ground of privilege and to the closely related question of the burden of evidence.

³¹³ *Udwin v May* 1978 (4) SA 967 (C). The judgement has been discussed in 1978 *Annual Survey*, 265-267. See also Burchell, *Defence of Privilege*, 173.

³¹⁴ *Udwin v May* 1978 (4) SA 967 (C) at 974 (H).

³¹⁵ *Ibid.* at 973 (D)-(E).

³¹⁶ *Ibid.* at 976 (A)-(B).

³¹⁷ *May v Udwin* 1981 (1) SA (A) 1 at 10 (A)-(C) and 12 (B).

The decision in *May v Udwin* must be viewed in the wake of the same court's decision in *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* which sent shockwaves through the legal fraternity in the late seventies. When *May* was decided in September 1981, the *O'Malley* decision was only four years old. This decision, which in the words of one commentator, contributed to the orderliness of the law of defamation in the same way as "Hercules's *tour de force* in the Augean stables", once and for all established *animus iniuriandi* as an essential requirement of the *actio iniuriarum*.³¹⁸ *Animus* was defined as subjective intention to defame with knowledge of unlawfulness.

Joubert JA, who delivered the unanimous judgement of the court in *May v Udwin*, used the opportunity to make a crisp summary of the law of defamation as it stood after the decision in *O'Malley*. The publication of defamatory matter leads to two rebuttable presumptions of fact: first, that the defendant acted with *animus iniuriandi*, that is intentionally and with knowledge of unlawfulness; secondly, that the publication was unlawful. The *onus* (in the form of a burden of rebuttal, or *weerleggingslas*) is then on the defendant to rebut at least one of these presumptions. The defendant may rebut the former presumption by proving a defence directed against *animus* (so-called *skulduitsluitingsgrond*), and the latter presumption by proving a defence directed against unlawfulness (so-called *regverdigingsgrond* or justification ground). One of the possible justification grounds available to the defendant is that the defamatory statement was uttered on an occasion of qualified privilege. In this case, the publication is regarded "...as being in the interest of public policy, and, therefore, as being lawful."³¹⁹

Joubert JA then turned his attention to the aspect of judicial liability and, more specifically, to the question of justification grounds. In analysing Roman law as well as the Glossators and the Roman-Dutch authorities, he came to the conclusion that none of these authorities appeared to draw a distinction between defences directed against wrongfulness and fault (*animus iniuriandi*).³²⁰ This clearly was due to the general development in civil law, which for centuries had not distinguished systematically between wrongfulness and fault.³²¹ As described earlier, this distinction emerged in South African law only towards the middle of our present century.³²² However, Joubert JA acknowledged that the presumption of *animus* in modern law had been

³¹⁸ Boberg, *Defamation*, 51.

³¹⁹ For the whole see *May v Udwin* 1981 (1) SA (A) 1 at 10 (D)-(G).

³²⁰ *Ibid.* at 12-14. See also above at chapter IV 3 1 and 4; chapter V 5.

³²¹ Zimmermann, *Law of Obligations*, 1006-1007, 1027-1028; Hutchison, *Aquilian Liability II*, 597-600 with further references; Kerr, *THR-HR* 55 (1992), 533-542; Neethling *et al*, *Law of Delict*, 9-11.

³²² See above at 2 1.

used by Roman-Dutch authorities (and in fact the jurists of the Italian *ius commune*) to reduce a plaintiff's difficulty in proving intention behind the wrongdoer's statement or act. Where the plaintiff proved defamatory words, they were *prima facie* uttered *animo iniuriandi*.³²³

The learned judge of appeal then analysed what a number of Roman-Dutch authorities had laid down with regard to defamation by judicial officers. Rightly, Joubert JA identified instances where judicial officers defamed a person while exercising the authority conferred upon them by virtue of their office as situations where the presumption of *animus iniuriandi* did not operate.³²⁴ From the authorities it was clear, furthermore, that this in a sense privileged situation ended where a judicial officer abused his authority or exceeded the limits of his authority.

However, his Lordship's quest for clarity on what exactly the Roman-Dutch authorities considered the limit of judicial privilege was not fulfilled. As shown earlier, the only criterion in Roman-Dutch law is that offered by Voet, i.e., the phrase *ad concitandam invidiam atque infamiam*.³²⁵ This criterion was interpreted by De Villiers CJ in *Bosman* to mean that a judicial officer acted "...in order to expose the party to hatred and disgrace...".³²⁶ In *May*'s case, Joubert JA interpreted Voet's criterion for abuse or excess of judicial authority as the (English) concept of malice, which has ever since lurked in the South African version of qualified privilege. Malice, thus, was reinstated as a way of forfeiting qualified privilege. Or, in the words of the learned Judge of Appeal:

"It is important at this stage to ascertain what the state of mind of a judicial officer is required to be on putting Voet's criterion [Commentarius ad Pandectas 47.10.2] to practical use. The phrase *ad concitandam invidiam atque infamiam* clearly emphasises the object or purpose (*oogmerk, doel*) of publishing the defamatory matter, viz. to expose the defamed person to odium, or ill-will, and disgrace. In the absence of any express reference to *animus* or *dolus* in the sense of intent (*opset*) it would seem that the judicial officer was required to have had a motive in mind which actuated his publication of the defamatory matter in abuse of his judicial authority or in excess of the limits thereof. In my opinion Voet's criterion must be accepted as being consistent with the position where a judicial officer, under the guise of performing his judicial functions, has been actuated by *personal spite, ill-will, improper motive, unlawful motive (ongeoorloofde oogmerk of motief)* or *ulterior motive*, that is to say, by *malice*, in his publication of the defamatory matter in order to expose the defamed person to odium, or ill-will, and disgrace. *Malice* has long been accepted by our courts as a term to designate what a plaintiff should prove in order to defeat the defence of qualified privilege."³²⁷

³²³ See above at chapter IV 2 text at fn124 *et seq.* and 4; further see chapter V 5 1 and 5 2.

³²⁴ *May v Udwin* 1981 (1) SA 1 (A) 16 (B) quoting Voet, *Commentarius*, 47.10.2.

³²⁵ See above at chapter V 5 2 1.

³²⁶ *Bosman v Bisset* (1881) 1 SC 319 at 323.

³²⁷ *May v Udwin* 1981 (1) SA 1 (A) 18-19.

Undoubtedly, *May v Udwin* authoritatively laid down the principles applicable to the field of judicial liability for defamation.³²⁸ For three reasons *May v Udwin* is considered a landmark decision.

Firstly, the concept of malice, which caused so much confusion within the *actio iniuriarum*, was reborn in this case and its importance conclusively affirmed. This, however, was made possible only by the preceding decisions of the Appellate Division, which reinforced *animus iniuriandi* as the gist of the action and distinguished between two kinds of defences, i.e., defences against wrongfulness and defences against fault.³²⁹ Therefore, malice was understood as nothing other than motive and: (a) could not be founded any longer on intent or *animus* or *dolus*; and (b) could not be used as a defence excluding fault, since a defence to exclude fault must exclude either intention or knowledge of wrongfulness.³³⁰ Malice as a motive simply did not imply anything with regard to the lack of one of the two constituent requirements of fault. Consequently, the road was now wide open for malice to be used in present day South African law (exclusively) within the element of wrongfulness in order to rebut a claim of qualified privilege.³³¹

Second, the court declared that malice was to be established from the facts of the case: the defamatory matter as such, the nature of the judicial function, the presence or absence of enmity between the parties and the circumstances relevant to the publication of the defamatory matter could all indicate malice.³³² In order to avoid unnecessary fetters on judicial independence, public policy required that certain objective elements should not be treated as conclusive proof *per se* of malicious conduct of judicial officers. Consequently, the relevance of the defamatory matter to the proceedings and/or the presence of reasonable foundation for it, which previously (in *Udwin's* case) had been considered on a par with malice, in *May v Udwin* were held to be only "...indicative of malice on the part of a judicial officer."³³³ The judgement in *May's* case, therefore, made it abundantly clear that the qualified privilege enjoyed by judicial officers in South African law is wider than the privilege available to other participants in the legal process

³²⁸ Burchell, *Defence of Privilege*, 173.

³²⁹ See above at 2 2.

³³⁰ Neethling *et al*, *Law of Delict*, 327.

³³¹ This is probably the right place to clarify that in fact the South African use of malice today is considerably different (more narrow) compared to the use of this concept in other common law legal systems, eg., England. Hence it is important to realise that Olowofoyeku in his work *Suing Judges*, 204 attributes a much wider meaning to malice. In fact, as will become apparent in due course Olowofoyeku's definition of malice is identical to *dolus*. See at 3 5 2 3 (b) for more details.

³³² *May v Udwin* 1981 (1) SA 1 (A) 19 (B)-(D).

³³³ *Ibid.* at 20 (D).

(parties, advocates, attorneys, witnesses) to whom the above-mentioned policy restrictions did not apply.³³⁴

Third, until 1994 when the Appellate Division gave its much disputed judgement in the case *Neethling v Du Preez, Neethling v Weekly Mail*³³⁵, *May*'s case affirmed the decision in *O'Malley*, in which the Appellate Division clarified the distinction between a full *onus* of proof on the defence and a mere evidential burden (*weerleggingslas*). In *May*, Joubert JA placed only an evidential burden on the judicial officer to establish that his conduct was justified.³³⁶ *May* chose to rebut the presumption of wrongfulness and adduced sufficient evidence for the defence of qualified privilege.³³⁷

On the basis of the present law, however, it must be pointed out that this consequence of the decision in *May* does not hold any longer. In *Neethling v Du Preez, Neethling v Weekly Mail*, the Appellate Division decided that the full *onus* of proof and not merely an evidential burden rested on a defendant in order to prove the defences of privileged occasion and of truth for the public benefit.³³⁸

However, the Appellate Division's decision in *May v Udwin* is also subject to criticism. From what has been said above it is evident that Joubert JA drew his definitive conclusion in favour of malice from the absence of an express reference by Voet to *animus* or *dolus*. But, with all due respect, there exist other passages the learned Judge of Appeal did not quote, where Roman-Dutch authorities considered certain (judicial) acts committed *dolo malo* (with *animus iniuriandi*) and not *ad concitandam invidiam atque infamiam* as instances where judicial officers were liable under the *actio iniuriarum* for exceeding their powers.³³⁹ These passages deal with intentional interrogation or torture. As shown earlier, Van der Keessel considered this under the rubric of instances where a judicial officer intentionally decreed and administered torture in a case that did not admit interrogation by torture, or if the judge was bribed and administered

³³⁴ *Neethling et al, Law of Delict*, 325, fn159, *Law of Personality*, 162 fn196; Critically Burchell in *Defence of Privilege*, 181-187, *Law of Defamation*, 250-251; Midgley, *Delict*, 82.

³³⁵ 1994 (1) SA 708 (A) 770.

³³⁶ *May v Udwin* 1981 (1) SA 1 (A) 10 (D). Also *Borgin v De Villiers* 1980 (3) SA 556 (A) 571 (E)-(G); *Marais v Richard* 1981 (1) SA 1157 (A) 1166 (H).

³³⁷ *May v Udwin* 1981 (1) SA 1 (A) 10 (B).

³³⁸ 1994 (1) SA 708 (A) 770. Preceded by *Mabaso v Felix* 1981 (3) 865 (A); *Joubert v Venter* 1985 (1) SA 654 (A); *Ferreira v Ntshingila* 1990 (4) SA 271 (A). For details see Schmidt, *SALJ* 102 (1985), 579 *et seqq.*

³³⁹ *May v Udwin* 1981 (1) SA 1 (A) 17 (H) with reference to D 47.10.32. See also Van der Keessel, *Praelectiones ad Jus Criminale*, 47.10.1

torture, or where he did not observe the limits prescribed by law. All these instances were considered an abuse of power in the light of *D* 47.10.32. Hence these were instances where the judicial officer had exceeded his power and could be sued under the *actio iniuriarum*.³⁴⁰

It is true that these examples are not directly related to the point at issue, namely defamation. However, Joubert JA's criterion of malice, as derived from the authorities applied in *May v Udwin*, appears not to have been the sole answer to the general question of what was considered an excess or abuse of power by a judicial officer under the *actio iniuriarum* in Roman-Dutch law.

This an appropriate point at which to report two alternatives to the concept of malice. It should be borne in mind, however, that both proposals were made prior to the decision in *May v Udwin*. The first proposal is that of MacMillan who adduced the view that qualified privilege is defeated by so-called actual intention or *dolus directus*.³⁴¹ In MacMillan's view, the occasion of privilege is granted for a certain purpose. If it can be proved that the defendant acted with an objective contrary to this purpose, he or she would have abused the occasion and lost the privilege. Hence, the decisive issue was the defendant's purpose or objective.

The point of divergence to the prevailing doctrine is the following: according to MacMillan, the defendant's (improper) purpose or objective is *not* synonymous with improper motive. The enquiry into purpose or objective is in fact a question of intention and not of motive. For actual intention or *dolus directus* to be present, a person must act with the aim and objective of committing an unlawful act. Hence, the question with regard to forfeit of qualified privilege was whether or not the defendant acted with intention, more precisely, with *dolus directus*. In analysing the proper meaning of malice in criminal law, MacMillan argues that in fact malice is synonymous with intention.³⁴² In English law, ill will, improper motive or spite have only in exceptional cases been described as instances of so-called express malice. In ignorance of what the proper meaning of malice is in South African law, the courts have mistakenly relied on the typical and superfluous concept of express malice as a determinant for the rebuttal of qualified privilege instead on intention, i.e., *dolus directus*.

³⁴⁰ See above at chapter V 5 2 2 and 5 2 3.

³⁴¹ *SALJ* 92 (1975), 144-164.

³⁴² *Ibid.* at 157 quoting Hunt and Burchell's *South African Criminal Law and Procedure* vol.1 (1970) 145 who stated: "It is clear that 'malice' in our criminal law means no more than intention, whether actual or legal..."

MacMillan's view was not accepted, and *May* proved him wrong.³⁴³ Not surprisingly, therefore, Boberg considered his view a mere flirtation with intention.³⁴⁴ Another view was advanced by Professor Carey Miller.³⁴⁵ To him, the (English) absolute privilege of judges for defamatory remarks was not an adequate solution since a 'blanket immunity' took no account "...of the undesirable consequences of shielding judicial conduct or comment that does not warrant protection from the point of view of the public interest."³⁴⁶ On the other hand, basing privilege merely upon improper motive or malice was a potential threat to judicial independence because it is all too easy to allege malice on the part of a judicial officer.

Although Carey Miller was of the opinion that it is very difficult for a plaintiff to prove malice sufficiently, it is undesirable that a judicial officer should be threatened with actions which allow too much room for subjective factors such as personality or demeanour that could be difficult to separate from issues of malice.³⁴⁷ Therefore, he suggested that the more objective criterion of reasonable relevance of the defamatory remarks in the matter before the court be used to determine rebuttal of judicial privilege.³⁴⁸

The liability of judges and magistrates for defamatory remarks made in the course of judicial proceedings may be summarised as follows:³⁴⁹ Judicial officers in South Africa, unlike those under common law legal systems in, for example, England or the USA, enjoy not absolute but a special kind of qualified privilege. Consequently, a judicial officer can be held liable if a plaintiff proves on a balance of probabilities that the judge or the magistrate made the defamatory remarks with a malicious or an improper motive.³⁵⁰

³⁴³ Against him also Boberg, *Defamation*, 47 and 52-53; Burchell, *Law of Defamation*, 250 fn85; Van der Merwe and Olivier, *Onregmatige Daad*, 415 fn52.

³⁴⁴ Boberg, *Defamation*, 47.

³⁴⁵ 1980 *Juridical Review*, 88-110.

³⁴⁶ *Ibid.* at 108.

³⁴⁷ *Ibid.* at 109.

³⁴⁸ *Ibid.*

³⁴⁹ See also Neethling *et al*, *Law of Delict*, 325 and Neethling *et al*, *Law of Personality*, 161-162; Midgley, *Delict*, 75 and 82; Burchell, *Defence of Privilege*, 178 and *Law of Defamation*, 250-251; Boberg, *Defamation*, 51-54.

³⁵⁰ Burchell, *Law of Defamation*, 252.

3 2 2 Liability for wrongful imprisonment

A South African judicial officer might also commit an actionable wrong by depriving someone of his or her liberty. The courts do not hesitate to stress *libertas* or physical liberty as a particularly important right:

“...[T]he liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement.”³⁵¹

Owing to English influences, two separate forms of infringement of physical liberty can generally be identified: wrongful imprisonment and malicious arrest.³⁵² Malicious arrest entails the improper use of the legal machinery in order to deprive someone of his or her physical liberty. In other words, the defendant makes use of the judge to effect the arrest by committing the third person to jail. Consequently, under this liability it is impossible for the judge himself to commit malicious arrest.³⁵³ Wrongful imprisonment, however, can be committed by a judicial officer. To succeed in an action for wrongful imprisonment a person must objectively (and directly) have been deprived of physical freedom by a judicial officer without justification. Under English influence, the courts have ignored *iniuria* as a requirement for wrongful imprisonment: neither fault nor negligence has to be established for liability.³⁵⁴ If the deprivation of personal liberty also caused patrimonial loss, the plaintiff may institute a further action under the *actio legis Aquiliae*.³⁵⁵

3 2 2 1 Cooper v The Government

In 1906, for the first time, the Transvaal Supreme Court was called upon in *Cooper v The Government* to decide on a claim for damages for illegal imprisonment.³⁵⁶ The applicant had been sentenced by a magistrate to a fine of 40 shillings or one day's imprisonment without hard labour. When the fine was not paid, the accused was committed to prison under a warrant wrongfully made out for one day with hard labour. He was released the next day after he had had

³⁵¹ *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) 707 quoted by Walter, *Actio Iniuriarum*, 155.

³⁵² Neethling *et al*, *Law of Delict*, 317.

³⁵³ *Ibid.* at 318.

³⁵⁴ *Donono v Minister of Prisons* 1973 (4) SA 259 (C) 262; *Shoba v Minister van Justisie* 1982 (2) SA 554 (C) 559; Neethling *et al*, *Law of Delict*, 318 and *Law of Personality*, 129-130; Van der Walt, *Delict*, 63; Wille's *Principles of South African Law*, 700, 704; Van der Merwe and Olivier, *Onregmatige Daad*, 550-555.

³⁵⁵ *Shoba v Minister van Justisie* 1982 (2) SA 554 (C) 559, 563-564; *Mthimkhulu v Minister of Law and Order* 1993 (3) SA 432 (E) 440-441; Neethling *et al*, *Law of Personality*, 130-131.

³⁵⁶ 1906 TS 436.

to break stones in a prison yard. Mason J, who delivered the judgement, rightly stressed the point that an action against the state for the wrongful act of a judicial officer will fail since judicial liability is exclusively personal liability of the officer concerned. The learned judge then embarked on an analysis of the chances of success of a personal action.

This early decision again serves as a good example of the strength of English legal influence on the law of judicial liability at the beginning of this century. Mason J commenced his analysis of the authorities with the following statement, which in those days was almost obligatory:

“The Roman-Dutch law with reference to the liability of judicial officers for errors in the performance of their functions appears to be substantially the same as that of England...”³⁵⁷

And even though Mason J stressed immediately that this statement might have to be qualified with regard to “...cases of wrongful acts done with a corrupt or malicious motive...”, this qualification is superfluous since, in the learned judge’s view, the general rule with regard to judicial liability was clearly the following:

“...[N]o judicial officer is responsible for acts done by him in that capacity within the *limits of jurisdiction* which he possesses...but when he does an act causing injury in respect of a matter wholly *without his jurisdiction*, he is liable in damages just as any other *tort-feasor*.”³⁵⁸

It appears from the judgement that the court based its decision on an assessment of English and American case law. The trio of leading common law cases of those years – *Scott v Stansfield*³⁵⁹, *Anderson v Gorie*³⁶⁰ and *Bradley v Fisher*³⁶¹ – received attention, as did the famous case of *Floyd v Barker*³⁶² where Coke CJ laid the foundation of the English law of absolute immunity which remained essentially unchanged until Lord Denning’s sweeping judgement in *Sirros v Moore* more than three centuries later.³⁶³

The analysis of the Roman-Dutch authorities, meanwhile, was unsatisfactory and inconsistent, the sole reference being to Voet. It is interesting that Mason J quoted a passage from Voet’s commentary which deals generally with the liability of magistrates under the *actio legis Aquiliae*.³⁶⁴ No reference was made to the passage where Voet discusses at length the liability of

³⁵⁷ *Ibid.* at 439.

³⁵⁸ *Ibid.* My italics.

³⁵⁹ 3 LR Ex 220.

³⁶⁰ [1895] 1 QBD 668 (CA).

³⁶¹ 80 US 335 (1872).

³⁶² (1607) 77 ER 1305.

³⁶³ See again above at chapter VI 4 1 4 1.

³⁶⁴ *Commentarius*, 9.2.15.

judicial officers.³⁶⁵ But where he referred to the *Digest*, Mason J's reference was to the *actio iniuriarum* and not the *actio legis Aquiliae*. Hence, it becomes increasingly unclear from which type of action the judge derived clarity as to the position of the civil law with regard to judicial liability. It has been shown earlier that the position of Roman-Dutch law was not identical under the *actio iniuriarum* and the *actio legis Aquiliae*.³⁶⁶

To return to the general rule as stated in *Cooper v The Government*: this rule was certainly not in accordance with Roman-Dutch law. In Roman and Roman-Dutch law, the question of want of jurisdiction and closely related aspects, namely the distinction between courts of record or not of record, have never played a role in the determination of the liability of judicial officers. In view of its acceptance of the general rule, the court's reference to malicious acts on the part of a judicial officer was simply to pay lip service to Roman-Dutch law. Nonetheless, the brief indication of malice is evidence of the fact that the good faith criterion was superficially extended to other areas of judicial liability.

3 2 2 1 Tilonko v The Governor, a Judge and the Attorney-General of Natal

Two years later, in the case of *Tilonko v The Governor, a Judge and the Attorney-General of Natal*, the Natal Supreme Court, well known for its tendency to adhere to English legal principles³⁶⁷, placed even more emphasis on English concepts.³⁶⁸ This case is remarkable for three reasons. Firstly, it contains not a single reference to Roman-Dutch law. Secondly, it introduces an interesting aspect of procedural law into the discussion, namely the concept of leave to sue.³⁶⁹ Thirdly, it is the only reported case where a superior judge was sued for damages.³⁷⁰

The applicant sought to sue a judge of the Supreme Court of the Colony of Natal in respect of a judgement in which the respondent had refused to release the applicant from prison since the court had no jurisdiction to order the release. This judgement had in effect been confirmed on appeal to the Privy Council. Notwithstanding this lack of success, an application was made for

³⁶⁵ *Ibid.* at 5.1.58.

³⁶⁶ See above at chapter V 4 5 and 5 4.

³⁶⁷ See above at 1 1 1 and text at fnn38 and 100-101.

³⁶⁸ (1908) 29 NLR 70.

³⁶⁹ For a full discussion of the related procedural questions see below at 4.

³⁷⁰ The case *Udwin v May* 1978 (4) SA 967 (C) concerned an action against a magistrate.

leave to sue, amongst other officials, the judge. Remarkably, compensation for deprivation of liberty was sought neither under the *actio iniuriarum* nor the *actio legis Aquiliae*, but under the English Habeas Corpus Act of 1679.

With regard to the application for leave to sue, the court considered itself obliged to decide whether or not the applicant had made out a *prima facie* case. To commence with the final decision, the court did not grant leave to sue. There are probably very few other cases in which a court has dismissed an application with harsher words than in *Tilonko*. Bale CJ, for instance, commenced his judgement with the not very encouraging remark that the application “...is...the most extraordinary one that has ever been made to this Court, and, probably, is in some particulars unique in the Courts of the Empire.” Dove Wilson J considered “...the application under all circumstances [as] ridiculous.” And Broome J topped these remarks with the words: “It seems to me nothing short of astonishing that such an application should seriously have been made to this Court.” In comparison with the cases discussed so far, the court’s reaction is a valuable example of how differently actions against superior and inferior court judges were perceived at the beginning of this century. Obviously, it was considered grossly inappropriate even to consider instituting an action against a Supreme Court judge.

With regard to the merits of the application, the court held that there was no authority whatsoever in the law according to which a judge could be held liable for a mistake in a judgement. Again, on the strength of *Anderson v Gorie* ³⁷¹, the court considered even malicious acts by a superior court judge (judge of a court of record) as not sufficient to make out a case of judicial liability. Since the court, furthermore, drew no distinction between superior and inferior courts in its judgement, it effectively held that all judicial officers were protected by absolute privilege and, thus, that no liability would ever exist. Bale CJ held that the sole remedy in a case of a “...malicious or perverse judgement...” was to seek the dismissal of the judge. However, as we have shown earlier, this decision to dismiss a judge was never that of a court in those days but solely of the sovereign upon an address of both Houses of Parliament; cold comfort, indeed. ³⁷²

In *Tilonko*, it may be said that the influence of Roman-Dutch law on the question of judicial liability reached its lowest point. No reference was made, not even a perfunctory one, to Roman-Dutch authorities. Nor was there any reference to those few cases where South African judges at

³⁷¹ [1895] 1 QBD 668 (CA).

³⁷² Section 26 Supreme Court Act No 9 of 1896. See above at 1 1 2 3.

least held high the banner of difference from English law, namely qualified immunity. Reading the decision of the Natal court in *Tilonko*, an observer must have been convinced that English law of judicial liability held complete sway in South Africa.

3 2 2 2 Penrice v Dickinson

Credit must go to the judges on the Bench of the Appellate Division in 1945 for leading South African law back to an approach which is more in line with the old authorities. In *Penrice v Dickinson*³⁷³, in an application for condonation of a delay in serving notice of an appeal, the applicant sought revision of a decision in the lower court where he had failed in an action for damages for wrongful deprivation of personal liberty sustained in consequence of two orders made by a magistrate. At the hearing of a charge of criminal defamation against the applicant, evidence was heard with regard to the mental condition of the applicant, who was diagnosed as suffering from a peculiar form of paranoia known as litigious paranoia. Upon the applicant's request for a postponement to produce evidence to the contrary, the magistrate hearing the case ordered the applicant to be removed straight to a mental institution for further observation on the basis of a medical report submitted by a doctor who had never seen the plaintiff. Hence a serious miscarriage of justice took place at the first hearing in that the applicant had not been allowed a proper opportunity to put his case and to lead medical evidence. The case was resumed two weeks later and it was decided by the same magistrate – again without hearing proper evidence for the applicant – to detain him as a Governor-General's patient in a mental institution.

It appears from the Appellate Division's judgement³⁷⁴, albeit not very clearly, that the performance of judicial functions by a magistrate was generally accepted by the judges as a sound defence against a claim for liability. Furthermore, the question of whether the respondent had acted in his judicial capacity when he made the two incorrect orders was not much at issue. Attention was given to determining the exact scope of liability of judicial officers, in other words what was required to rebut this defence of having acted in a judicial capacity.

It is striking that Tindall JA relied here, some 36 years after the decision in *Tilonko*, exclusively on Roman-Dutch authorities to clarify the law in this respect. Now not a single reference was made to English case law. In analysing the position of Roman-Dutch law, Tindall JA drew on the passages where the Roman-Dutch authorities commented on the liability of the *iudex, qui*

³⁷³ 1945 AD 6.

³⁷⁴ *Per* Tindall JA, Greenberg JA and Davis AJA concurred.

litem suam fecit. Not all the relevant Roman-Dutch authorities were quoted, but reference was at least made to Groenewegen's *De Legibus Abrogatis*, to Vinnius' *Commentarius ad Institutionum*, to Voet's *Commentarius ad Pandectas* and to Van Leeuwen's *Rooms-Hollands Regt*. Generally, cases of wrongful imprisonment, such as this one, involve an incorrect application of the law. In this respect they are significantly different from actions for defamation under the *actio iniuriarum*. This distinction is recognised by the Roman-Dutch authorities, and the historical sources provide enough clarity for us to appreciate their view.

Rightly, therefore, the Appellate Division turned its attention to the interpretation of *Inst* 4.5.pr by the Roman-Dutch writers and, rightly, reference was made not to the more specialised qualified privilege in defamation but, more generally, to the defence of having performed judicial functions. Nevertheless, the court was convinced that substantially the sources did not indicate a different view. The learned Judge of Appeal came to the conclusion that the defence of performance of judicial function could be rebutted, and hence liability established, only by proof that the judicial officer had acted *mala fide*, without good faith, in making the incorrect decision.³⁷⁵ Since the applicant was not able to establish that the magistrate had acted *mala fide* when making the two orders in question, the court refused the application for condonation.

In *Penrice v Dickinson* the Appellate Division thus affirmed the tendency to accept that judicial liability *generally* appeared to be determined by the criterion of good faith. Or, to put it differently, the question of a good or bad motive became relevant for the determination of the scope of judicial liability not only within the law of judicial defamation but also for other judicial wrongs such as, for example, wrongful imprisonment. This was apparent as early as 1906 in *Cooper v The Government*, and was also accepted in 1922 in the Appellate Division's decision in *Matthews v Young*. The latter, however, did not concern wrongful imprisonment and will be discussed in more detail below.³⁷⁶

3 2 2 3 Moeketsi v Minister van Justisie en'n Ander

Almost another half century passed before, in 1988, the Transvaal Provincial Division again had to decide on the question of liability of a judicial officer for wrongful imprisonment.³⁷⁷ Apart

³⁷⁵ *Penrice v Dickinson* 1945 AD 6 at 14-16.

³⁷⁶ 1922 AD 492 at 509. *Matthews v Young* was, however, not a case on wrongful deprivation of liberty. The case will be discussed in more detail below at 3 3 2.

³⁷⁷ 1988 (4) SA 707 (T). For a critical evaluation of this judgement see Neethling, *THR-HR* 52 (1989), 466-469.

from the Appellate Division's decision in *May v Udwin*, the case of *Moeketsi v Minister van Justisie en 'n Ander* was the only other case in which a court was called upon to analyse the exact position of judicial liability within the law of delict subsequent to the authoritative ruling of the Appellate Division in the second half of this century on the relation between wrongfulness and fault.³⁷⁸ The question here was whether or not to reaffirm the tendency that had emerged in *Penrice v Dickinson* towards extending the good faith criterion beyond the boundaries of defamation. The court repeated that, on authority of *May v Udwin*, improper motive was the decisive criterion in determining judicial liability for defamation. Consequently the question arose whether the same should apply to liability for wrongful imprisonment?

In *Moeketsi*, a regional magistrate, without applying the principle of *audi alteram partem*, had ordered the arrest and removal of the plaintiff, a policeman, who when present in the court had apparently disturbed the court proceedings. The plaintiff sought damages in the amount of R15 000 from the Minister of Justice and the magistrate for wrongful arrest and detention. After weighing the evidence, Van Zyl J came to the conclusion that the magistrate's action had been unreasonable (*onredelik*) and unjustified (*ongeregverdig*).³⁷⁹ However, anyone who believed that this statement by the learned Judge implied that the magistrate had acted wrongfully and was therefore liable for wrongful deprivation of liberty was to be disappointed. Van Zyl J went on to say: "*Of dit egter 'n onregmatige daad teenoor die eiser daarstel is 'n ander vraag...*".³⁸⁰ And, in fact, the learned judge, after having analysed extensively a number of Roman-Dutch authorities, concluded that merely unjustified and unreasonable conduct was not sufficient:

"[I]n ons reg" said Van Zyl J "'n regsprekende beampte wat in sy judisie hoedanigheid optree [is] slegs vir sy kwaadwillige of bedrieglike optrede aanspreeklik."³⁸¹

Van Zyl J went on to say that, generally, *onredelikheid* (unreasonableness) was based on negligence. However, in the case of a judicial officer, mere negligence was not sufficient for delictual liability. There had to be evidence of *mala fides* (malice or fraud) on the part of the officer before any liability could arise. Since the plaintiff was not able to show that the magistrate had acted *mala fide* Van Zyl J rejected the claim. Thus the good faith criterion was accepted and reaffirmed in *Moeketsi* as the essential criterion to rebut the privileged status of a judicial officer.

³⁷⁸ See above at 2 1.

³⁷⁹ *Moeketsi v Minister van Justisie en 'n Ander* 1988 (4) SA 707 (T) at 711 (B).

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.* at 713 (G).

Like Tindall JA in *Penrice*, Van Zyl J relied exclusively on Roman-Dutch authorities to support his opinion. The learned Judge made reference to some of the most important authorities, namely Groenewegen, Voet, Van Leeuwen and Van der Keessel, as well as to the Appellate Division's decision in *Penrice v Dickinson*. Rightly, Van Zyl J rejected the approach taken by earlier judgements in *Cooper v The Government*, *Tilonko v The Governor*, *a Judge and the Attorney-General of Natal* as not authoritative for the determination of the liability of judicial officers.³⁸² The decision was well in accord with the principles of judicial liability that had emerged from *May v Udwin* some seven years earlier. Beyond that, it finalised the general direction that had emerged in *Penrice* some 43 years earlier.

The decision in *Moeketsi* did not escape criticism from academic commentators.³⁸³ It was not so much the outcome of the decision that was challenged as some details with regard to its reasoning. The most important aspect of the criticism appears to be that the conduct of the magistrate was incorrectly considered *onredelik* and *ongeregverdig*, in other words as *onregmatig* or wrongful. With regard to the present position of judicial liability, critical assessment of which will follow in due course, brief reference should be made to the pertinent opinion of Professor Neethling. In his view, a judicial act, regardless of how reprehensible or dubious, has to be considered lawful as long as the judicial act was committed *bona fide*.³⁸⁴ On the basis of the present position in law, Neethling convincingly argued that there was no other interpretation or in-between solution, as indicated by the court in *Moeketsi*. It was the logical consequence of the proper and sufficient establishment of the defence of official capacity.

Apart from this, Professor Neethling criticised the court for diffusing the clarity of the law in reference to the terms *skuld* and *skuldvorm of nalatigheid*. Fault, including negligence, is generally irrelevant for the determination of wrongfulness. However, wrongfulness is the decisive criterion of liability since wrongful imprisonment is an example of so-called no fault liability. Therefore, the court's reference to negligence served only to confuse.

In consequence of the decision in *Moeketsi*, the present position with regard to wrongful imprisonment appears to be as follows:³⁸⁵ After a *prima facie* case of deprivation of liberty has been made out, a presumption of wrongfulness arises. A judicial officer may raise a defence to

³⁸² *Ibid.* at (F).

³⁸³ See the excellent article by Neethling in *THR-HR* 52 (1989), 466–469. Not very accurately, however, Midgley, *Delict*, 75.

³⁸⁴ Neethling, *THR-HR* 52 (1989), 468.

³⁸⁵ See also Neethling *et al*, *Law of Delict*, 318 and Neethling *et al*, *Law of Personality*, 128; Midgley, *Delict*, 75.

rebut this presumption. Usually he will rely on the defence of official capacity, which he has to prove on a balance of probabilities. It will then be presumed that he acted lawfully within the bounds of the justification ground. The onus is then on the plaintiff to establish that, in fact, the judicial officer acted unlawfully. The plaintiff may do that by proving that the judicial officer acted with a reprehensible or improper motive, i.e., that he was actuated by *mala fides* (malice or fraud). Therefore, according to the decision in *Moeketsi*, judicial liability for wrongful imprisonment is governed by the same principle as that governing judicial liability for defamation.

3 3 Judicial liability for patrimonial loss due to a wrongful misjudgement

Turning now to actions for patrimonial loss suffered, it may be asked whether this tendency in South African law to determine the liability of judicial officers by means of a qualified good faith criterion prevails also with regard to claims against judicial officers under the *actio legis Aquiliae*; in other words, whether good faith is not merely a trend, but has become the basis of a comprehensive dogma in modern South African law of judicial liability.

3 3 1 The Cape of Good Hope Bank v Fischer

In 1886, the Cape Supreme Court, under the auspices again of De Villiers CJ, was called upon to consider the question of the Aquilian action in *The Cape of Good Hope Bank v Fischer*.³⁸⁶ The facts of the case were the following: a registrar of deeds had failed to register a properly executed mortgage bond and, consequently, the plaintiff suffered patrimonial loss due to the loss of preference. Comparing the conveyancing of land in the Netherlands (which was done by the local magistrates) to the situation at the Cape where, after the enactment of Ordinance No 39 of 1828, only registrars were permitted to perform this task, the learned Chief Justice stated, albeit without detailed reference to specific Roman-Dutch authorities:

“I can find no authority for the contention that such a judge or magistrate would have been liable for any loss occasioned by mistakes made by him in good faith in the performance of his duties.”³⁸⁷

³⁸⁶ (1886) 4 SC 368.

³⁸⁷ *Ibid.* at 375.

In contemporary parlance: liability in Roman-Dutch law for wrong judgements was only for conduct committed *mala fide*. Admittedly, De Villiers CJ's statement in *Cape of Good Hope Bank* is open to interpretation, namely that his Lordship may have considered modern judicial officers likewise to be covered by this (not very specific) kind of good faith immunity. This interpretation is supported by the following section, where one reads that the Chief Justice was not prepared to extend any of this judicial immunity to a Cape Colonial registrar of deeds, whose functions he considered to be mainly of an administrative nature.³⁸⁸ Be that as it may, one thing can safely be deduced from this case: we are faced again with an early (1886) appearance of the good faith criterion.

3 3 2 Matthews v Young

A subsequent instance where the *actio legis Aquiliae* had to be considered with respect to judicial liability was the well-known case of *Matthews v Young*.³⁸⁹ Strictly speaking, the decision concerned the liability of members of a commission that acted merely in a quasi-judicial capacity, and not a judicial body.³⁹⁰ Nonetheless, the underlying principles would seem to apply alike to courts in the strict sense. The plaintiff had lost his employment after he was expelled from his trade union. In the proceedings for his re-instatement, it became evident that the procedure followed at the enquiry, which had led to his expulsion by the trade union, had been irregular. Even though the plaintiff was reinstated, his former employer did not give him back his job. Therefore, he sued the officials of the union who had sat on the union council for economic loss arising out of the unlawful expulsion. The plaintiff won in first instance, but the decision was taken on appeal by the council members.³⁹¹

After De Villiers JA had decided that it was under the *actio legis Aquiliae* and not under the *actio iniuriarum* that the respondent (the plaintiff in the action *a quo*) was claiming compensation, he decided that the respondent could not succeed on appeal. The appellants were held to have acted as a properly constituted tribunal under the rules of the union, in a quasi-judicial capacity, and therefore, although the judgement was procedurally wrong, it was not wrongful, because it was given *bona fide*: the appellants had acted in the honest discharge of

³⁸⁸ *Ibid.* at 375.

³⁸⁹ 1922 AD 492.

³⁹⁰ For a detailed discussion of the judicial liability of quasi-judicial bodies see below at 3 4.

³⁹¹ For a classification of this case in a broader spectrum of delictual liability see Hutchison, *Aquilian Liability II*, 612. See also Price, 1954 *BSALR*, 23.

their duties.³⁹² In modern terminology: the applicants had successfully raised the justification ground of official capacity and therefore the *onus* was on the respondent to prove that the members of the council were actuated by a reprehensible or improper motive. Since the respondent failed to do so, the appeal had to be upheld.³⁹³

At the time when *Matthews v Young* was decided, no clear-cut distinction between wrongfulness and fault and the corresponding defences had emerged.³⁹⁴ From the most recent discussion of *Matthews v Young* by Professor Hutchison, titled “A glimpse of the modern approach”³⁹⁵, it appears that *Matthews* was in fact one of the early cases that made it clear that wrongfulness was a separate requirement for delictual liability.

De Villiers JA’s reasoning that it was only a *mala fide* discharge of (quasi) judicial duties that would lead to forfeiture of a privileged status was based exclusively upon the authority of some Roman-Dutch authorities, namely Groenewegen’s and Voet’s comments on the quasi-delictual liability of the *iudex, qui litem suam fecit*.³⁹⁶ However, the true spirit, now familiar to us, that guided De Villiers JA through his interpretation of the sources in *Matthews* appears in the following passage:

“...they [the members of the union’s council] were acting in a *quasi*-judicial capacity, and are, therefore, under our law, as also, I understand, under the English law, not liable for any damage provided they acted *bona fide*...”³⁹⁷

A few sentences later, he referred once again, as was natural in those days, to the concept of malice.³⁹⁸

Consequently we may conclude that, just as in the case of defamation and wrongful imprisonment so too here in the case of liability under the *actio legis Aquiliae* for economic loss suffered in consequence of a wrong judgement, malice or improper motive was adopted as an essential requirement for (quasi) judicial liability.

³⁹² Innes CJ and Kotzé JA concurred.

³⁹³ *Matthews v Young* 1922 AD 492 at 510.

³⁹⁴ See again above at 2.1 for more details.

³⁹⁵ Hutchison, *Aquilian Liability II*, 612.

³⁹⁶ *Tractatus*, Inst.4.5.pr and *Commentarius*, 5.1.58, respectively.

³⁹⁷ 1922 AD 492 at 509-510. My italics.

³⁹⁸ *Ibid.*

3 4 Liability of members of so-called quasi-judicial bodies

In South African law, the principle of qualified immunity of judicial officers in delict is extended in a more or less identical manner beyond the ordinary courts. It applies also to all those persons or bodies that participate in the adjudication process in a non-curial capacity.³⁹⁹

Because South Africa does not have true administrative courts, these non-curial bodies contain the plethora of tribunals adjudicating within the administrative sphere that have already been described above.⁴⁰⁰ It should not be overlooked, however, that there are numerous examples where adjudication takes place outside the jurisdiction of the ordinary courts or administrative tribunals. There are, for instance, courts martial⁴⁰¹, ecclesiastical committees of inquiry⁴⁰², as well as general councils of trade unions⁴⁰³ or employers' associations⁴⁰⁴, arbitrators⁴⁰⁵ or persons who are called upon to adjudicate in the government of voluntary institutions or associations, which on a different basis (not necessarily public or administrative law) render decisions binding on those who are subject to the body in question.

In analysing the expansion of this qualified judicial immunity to a sphere outside the ordinary courts, it again becomes evident that in South African law, as distinct from English law, questions of jurisdiction or to what court (superior court or court of record) the adjudicating officer belongs are absolutely irrelevant: it is exclusively the person who performs *a judicial act* who, for reasons of policy, is protected from too wide a liability in delict. If, therefore, the performance of a judicial act is the decisive requirement in providing the performing officer or member of a body with qualified immunity, it becomes essential to determine whether or not the official or member of the body had indeed performed a judicial act and to distinguish this act from other acts which do not enjoy the same degree of protection.

³⁹⁹ See *Matthews v Young* 1922 AD 492 at 508-509; *Hoffman v Meyer* 1956 (2) SA 752 (C) 756 (B); Wiechers, *Administrative Law I*, 114.

⁴⁰⁰ Above at 1 2 1 3. Furthermore reference should be to Baxter, *Administrative Law*, 220-222; Wiechers, *Administrative Law I*, 93-115 with a summary at 112-115. Partly outdated, however, is the overview provided by Will, *Machinery of Law*, 284-320

⁴⁰¹ *Mönning and Others v Council of Review and Others* 1989 (4) SA 866 (C); McKerron, *Delict*, 82; Van der Merwe and Olivier, *Onregmatige Daad*, 106-107 fn60.

⁴⁰² *Lucas v Wilkinson* 1926 NPD 10; *Abrahamse v Phigeland* 1932 CPD 196; *Cohen v Committee of Harrismith Hebrew Congregation* 1924 OPD 25.

⁴⁰³ *Matthews v Young* 1922 AD 492 at 508-509.

⁴⁰⁴ *Tvl Coal Owners Association v Board of Control* 1921 TPD 447.

⁴⁰⁵ *Hoffman v Meyer* 1956 (2) SA 752 (C).

One is confronted here with sheer confusion in terminology. The participation of non-curial organs in the adjudication process involves reference not only to judicial acts but *inter alia* to quasi- or semi-judicial bodies, to quasi- or semi-judicial acts and to non-administrative acts. Professor Baxter once summarised the persistent confusion as follows: The term 'judicial', he says,

"...often...has attached to it the adjectives 'semi-' or 'quasi' as a means of indicating some sort of difference between curial 'judicial' decisions and administrative 'judicial' decisions, or of indicating some sort of difference in quality, procedure, form or effect between 'quasi-judicial' and other administrative acts."⁴⁰⁶

While the term quasi-judicial appears suitable to describe the category of non-curial administrative officers or members of bodies which participate in the process of adjudication, the term may not be used to pinpoint those acts that would fall under the ambit of qualified judicial immunity. Quasi-judicial acts or decisions are, in fact, not judicial acts but a peculiar kind of administrative act which came to be known as quasi-judicial in order make the distinction from so-called purely administrative acts.⁴⁰⁷ It is probably one of the most frequent mistakes in this field of law to assume that members of quasi-judicial bodies naturally also perform quasi-judicial acts. What is correct is that persons acting in a quasi-judicial capacity generally perform judicial acts. The distinction between judicial acts and quasi-judicial acts has important consequences for the liability for acts that cause either sentimental or economic loss. Administrative officers acting judicially in a quasi-judicial capacity or other members of quasi-judicial bodies enjoy a qualified immunity from personal delictual liability.⁴⁰⁸ The misperformance of quasi-judicial or purely administrative acts by administrative officers, on the other hand, can result only in the liability of the state.⁴⁰⁹

The coincidence of purely judicial, quasi-judicial administrative and purely administrative acts is particularly evident from the various functions magistrates perform. Besides the formal aspects

⁴⁰⁶ Baxter, *Administrative Law*, 345-346.

⁴⁰⁷ The meaning of quasi-judicial act is controversial. Some authors contend that the term quasi-judicial act should not be used at all. See Wiechers, *Administrative Law I*, 124; Baxter, *Administrative Law*, 345-346 and 576-577. Others adhere to the use of the term since it is firmly established, provided that clarity exists on the content of the concept. See Wiechers, *Administrative Law I*, 136. Generally see Baxter, 573-580 and Wiechers, *Administrative Law I*, 123-136 and *THR-HR* 29 (1966), 201; Street, *SALJ* 84 (1967), 385.

⁴⁰⁸ *Matthews v Young* 1922 AD 492; *Hoffman v Meyer* 1956 (2) SA 752 (C).

⁴⁰⁹ *The Cape of Good Hope Bank v Fischer* (1886) 4 SC 368 at 375; *Pullen, Bartman and Orr v Waja* 1929 TPD 838; *Kleinenberg v Clerk of Court Pietersburg* 1904 TS 90. Further Baxter, *Administrative Law*, 346 fnn20 and 21, 632-634; Wiechers, *Administrative Law I*, 94, 104, 339-340 and his *Administrative Law II*, 92 and 97; Cilliers and D'Oliveira, *State Liability*, 256; Van der Westhuizen, *Länderbericht Südafrika*, 632 and 650-651.

analysed above⁴¹⁰, which undoubtedly incorporate the magistracy in the sphere of the judiciary rather than the executive, magistrates' duties still contain a considerable administrative element. As early as 1891, it was made clear that magistrates serve not only in a judicial capacity but in an administrative one as well:

"Usually...the term 'Magistrate' designates an official who is concerned, solely, with the administration of justice....But I regret to say that such a definition of the term reflects but dimly and faintly the multitudinous character of a Magistrate's duties in this Colony. He is, indeed, a man of infinite capacity."⁴¹¹

The relation between purely judicial acts by magistrates and delictual liability has been discussed at length in the previous chapters. Issuing licences, marrying couples, dealing with instances of infectious diseases, attending divisional council meetings and dealing with the assignment of agricultural credits or Land Bank loans are but some examples of the wide range of quasi-judicial or purely administrative acts also performed by magistrates where infringements of rights could possibly take place. According to one source, up to 15% of a magistrate's time is regularly devoted to administrative work.⁴¹²

It is important, therefore, to distinguish between these various activities to determine whether or not officers or persons who do not perform judicial acts exclusively are personally liable for acts that infringe another's rights. It is not surprising that a number of proposals have been made by the courts and the legal literature regarding appropriate tests of whether or not an act may be considered judicial.⁴¹³ It falls outside the scope of this work to discuss these proposals at length. Therefore, only a brief overview will be presented.

The so-called control test, namely whether the public official is under the control of a superior while making his decision⁴¹⁴, is one criterion. If the state does not exercise any control, the official has performed neither a purely administrative nor a quasi-judicial act, but a judicial act. The state may not be held liable and, therefore, only personal delictual liability of the officer

⁴¹⁰ See above at 1 2 1 2 and 1 2 1 3.

⁴¹¹ *Reid v Gilson* (1892) 13 NLR 323 at 325.

⁴¹² Fernandez, *Analysis and Critique*, 121; Dicker, 1995 *De Rebus*, 637.

⁴¹³ See *inter alia* *S v Carse* 1967 2 SA 659 (C) 663-664; *Matiwane v Estcourt Town Council* 1967 3 SA 104 (H) 109 (D)-(E); *Helderberg Butcheries (Pty) Ltd v Municipal Valuation Court Sommerset West* 1977 (4) SA 99 (C); *S v Chicaca* 1980 (2) SA 784 (T); *S v Noka* 1980 (4) SA 384 (O); *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A); *Minister of the Interior v Harris* 1952 (4) SA 769 (A). Furthermore Baxter, *Administrative Law*, 345-346 and 632-634; Wiechers, *Administrative Law I*, 93-104.

⁴¹⁴ *De Villiers v Minister of Justice* 1916 TPD 463; *Smith v Union Government* 1933 AD 363; *Swarts v Minister of Justice* 1941 AD 181; *Union Government v Thorne* 1930 AD 47.

might be of avail to the injured party. The weaknesses of this approach appear from the fact that, until 1993, magistrates were always subject to administrative control since they were considered public servants.⁴¹⁵ Professor Marinus Wiechers has proposed in this respect that a magistrate's normal position be considered that of judicial officer and that qualified immunity be conferred on his administrative acts as well.⁴¹⁶ Quite remarkably, he argues that superior court judges should also enjoy comprehensive and unrestricted qualified immunity even for acts that are really administrative, for example sequestration orders.

Another test that has been applied is the so-called functional test. In *Matthews v Young*, De Villiers JA held that the general council of a trade union which had wrongfully ordered Young's exclusion from the union had

“...purported to act under the rules of the society [the Union], and in doing so they were performing functions analogous to those performed by a judge, they were acting in a quasi-judicial capacity...”⁴¹⁷

The crucial question here is in what function or sphere the magistrate, officer, council or body in question acted.⁴¹⁸ This test, it appears, was also applied by De Villiers CJ in the case of *The Cape of Good Hope Bank v Fischer*, where the learned judge decided that a registrar of deeds' functions are mainly ministerial or administrative. Consequently, the judge denied the registrar the right to “...shelter himself behind his judicial immunity when sued for a loss arising clearly...from a breach of his ministerial duties.”⁴¹⁹ More recently, however, in *Knop v Johannesburg City Council*, it was held that the nature of the official's function or capacity “...cannot be elevated into propositions of law embodying self-contained criteria for determining liability”.⁴²⁰ The nature of the function is but one of the aspects that need to be addressed.

Other decisions saw the courts referring to the criteria of the much-criticised *Donoughmore Report*⁴²¹ in order to draw a proper distinction between judicial and quasi-judicial decisions.⁴²² This report was criticised for placing too much emphasis upon merely procedural differences.⁴²³

⁴¹⁵ Wiechers, *Administrative Law I*, 340. See also above at 1 2 1 2 and Dicker, 1995 *De Rebus*, 635.

⁴¹⁶ Wiechers, *Administrative Law I*, 340.

⁴¹⁷ 1922 AD 492 at 509. My italics.

⁴¹⁸ Wiechers, *Administrative Law I*, 340.

⁴¹⁹ (1886) 4 SC 368 at 375.

⁴²⁰ 1995 (2) SA 1 (A) 24.

⁴²¹ See Baxter, *Administrative Law*, 345 for details.

⁴²² *Peri-Urban Areas Health Board v Administrator, Transvaal* 1961 (3) SA 669 (T) 674; *Bell v Van Rensburg NO* 1971 (3) SA 693 (C).

⁴²³ See Baxter, *Administrative Law*, 224 n229, 345-346 n14 and Wiechers, *Administrative Law I*, 123-124 for details.

The approach of examining the procedures and the composition of the organ in question⁴²⁴ has not been considered decisive. That the members of the adjudicating organ are lawyers and the proceedings resemble those of the ordinary courts may serve as an indication that a judicial act was indeed performed. But, as said earlier, there are numerous examples of court-like tribunals where legally untrained assessors adjudicate, as well as parliamentary commissions of inquiry where superior court judges preside and where the commission is by no means considered a court.

Drawing on De Smith, an English author, Professor Wiechers put forward four criteria or general tests:⁴²⁵ A judicial act contains a final and binding decision (*res judicata*). The regular duty of deciding a legal issue or a dispute between two parties (*lis inter partes*) is involved. The legal mode of operation or legal means used by the organ in question must be assessed. Finally, it may be asked whether the act in question imposes or finalises obligations or affects existing rights. With regard to administrative judicial acts, Professor Wiechers comes to the conclusion that it is not possible or desirable to use only one test to verify whether an act is judicial or not.⁴²⁶ It is submitted that this conclusion applies equally to non-administrative bodies.

In Professor Wiechers' eyes, both substantive and formal tests ought to be applied. Thus it may be asked, with regard to substantive aspects, whether there is a legal dispute as regards privileges, freedoms, powers or duties. Furthermore, it ought to be examined whether or not legal norms are applied by ascertaining disputed facts and/or passing judgement. With regard to formal aspects, a rule-of-thumb test may be to enquire whether or not the organ in question has the qualities normally attributed to a judicial organ, such as independence, accessibility, trial procedure, training of its members, or what its status is. According to Wiechers, the decisive formal test is to determine the legal effect of the act. A judicial act, as distinct from administrative or quasi-judicial acts, is always final and binding on the parties.

In the final analysis, the point is made by Professor Baxter that a judicial act and its attached qualified immunity should find only restricted application.⁴²⁷ The characterisation of an act as a judicial one is only proper if consideration is given to the policy considerations upon which this

⁴²⁴ Wiechers, *Administrative Law I*, 94.

⁴²⁵ *Ibid.* at 95-99.

⁴²⁶ *Ibid.* at 102-103.

⁴²⁷ Baxter, *Administrative Law*, 633-634.

immunity is based, namely that the official's independence and impartiality while adjudicating a dispute between two parties is paramount and begs complete protection.

In summary, it is evident that, substantially, the scope of delictual liability of quasi-judicial (non-curial) bodies is identical with that of members of ordinary courts (curial bodies). Whether a quasi-judicial body performs a judicial or merely a quasi-judicial or purely administrative act is problematic and can only be ascertained by properly applying both formal and substantive tests of evaluation.

3 5 Critical assessment of modern South African law of civil judicial liability

3 5 1 Summary of the current law of civil judicial liability

Judicial officers, including judges, magistrates, and administrative officers or other persons acting in a so-called quasi-judicial capacity, may be liable in delict only if they exceed the limits of the provisional protection that is conferred upon them in consequence of their performing judicial acts. Accordingly, the immunity these judicial officers enjoy in South Africa is only a qualified one, i.e., it is open to a plaintiff to rebut the defence raised by the judicial officer. Two distinct defences or justification grounds are available to judicial officers. In an action for damages for defamation, a judicial officer may raise the defence of qualified privilege. In an action for damages for wrongful imprisonment or wrongful misjudgement, a judicial officer may raise the defence of official capacity. South African law has now reached a point where both these justification grounds may be rebutted in practically the same way: the plaintiff on a balance of probabilities has to prove that the judicial officer exceeded his provisional protection or, in other words, that he abused his judicial office. The plaintiff may do so only by showing improper motive (malice or *mala fides*) on the part of the judicial officer. The result is evident: in modern South African law the good faith criterion, or improper motive, plays an essential role in determining the wrongfulness and liability of a judicial officer.

In a recent contribution to the historical development of South African Aquilian liability Professor Hutchison aptly referred to the concept of wrongfulness as a 'brake on liability'.⁴²⁸ The concept of wrongfulness was intended as an additional element to apply policy

⁴²⁸ Hutchison, *Aquilian Liability II*, 619.

considerations to cases where it appears necessary to restrict liability. The reason for this restrictive approach lies in that South African law still does not accept liability for every situation where harm is caused culpably. Generally speaking, borderline situations where culpable conduct causing harm is still not actionable can be found in the area of negligent conduct. Judicial liability may certainly be said to be among such borderline cases⁴²⁹ since most people would agree that it is difficult to reconcile it with the need for judicial independence and that liability for negligent conduct in this situation, hence, is not always appropriate.⁴³⁰ The words of Lord Denning again come to mind:

“... [each judge should be able to] do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: ‘If I do this, shall I be liable in damages?’”⁴³¹

Consequently, in a case of wrong judgement, it may be that the judge made a mistake – i.e., that the judgement was objectively wrong – and that there was causation of loss (or, alternatively, deprivation of liberty) and even that there was negligence on the part of the judge (through misapplication of the law), but it does not follow that the judge will be held delictually liable under the *actio legis Aquiliae* or the *actio iniuriarum*. At this point policy considerations come into play and a weighing process, the result of which is that, unless improper motive on the part of the judge can be established, the conduct was not wrongful, that is overall lawful, and the judge is consequently not liable.

However, this line of reasoning, which is perceived to be in accordance with the presently accepted approach of South African law, is open to criticism. Apart from the fact that the legal position has hardly been spelt out as clearly as this by the courts⁴³², a number of issues are not analysed. The literature and case law rush over significant aspects, the underlying details of which go unexplained. Scant attention, for instance, has been paid to the precise definition of what constitutes a wrong judgement. Further, the uncritical acceptance of improper motive calls for scrutiny, particularly in the light of recent constitutional developments and, interestingly, also in light of the proper application of the Roman-Dutch authorities in this field. Finally, it appears that the fault requirement of judicial liability needs re-evaluation.

⁴²⁹ For instance inducement of breach of contract or numerous cases of causation of pure economic loss.

⁴³⁰ For details see below at chapter VI 3 5 2 2 (c) (ii) (β); 3 5 2 3 (b).

⁴³¹ *Sirros v Moore* [1974] 3 WLR 459 at 470.

⁴³² For instance see again above at 3 2 2 3 the discussion of *Moeketsi's* case.

In the following section, these arguments will be pursued to provide a critical assessment of the modern South African approach towards civil judicial liability.

3 5 2 The essential requirements of the element of wrongfulness

Wrongfulness with regard to judicial liability exists only when two essential requirements are met: there must be a wrong judgement and the judge must have a particular state of mind when giving the judgement.⁴³³

3 5 2 1 *The requirement of wrong judgement*

Judicial liability for wrongful imprisonment and wrongful misjudgement have one thing in common: in both instances the individual suffers from a wrong judgement made by a judicial officer. Exercising judgement is generally a difficult mental decision-making process and the judicial process must allow enough room for legal argument and balancing of interests. To adopt an image presented by Professor Rheinstein, referred to in the general introduction, judicial officers are not slot machines which can be fed with legal knowledge and, in turn, will spew out the correct judgement.⁴³⁴ Not for nothing is Justitia's one symbolic tool the scale.

Wrong judgement, therefore, is a relative term. *Prima facie*, the single effective determinant of what must be considered a wrong judgement is an objective one: a wrong judgement is at hand where something which is illegal is declared legal, or where something which is legal is declared illegal. In other words, to be wrong the judgement must be clearly contrary to a legal rule or norm that is established by the authoritative sources of law. It is evident that there hardly exists a more objective standard for the determination of whether or not a judicial officer's decision is wrong. However, it would be naive to assume that the legal sources relied upon are definitive and unequivocal. A statute or a precedent may allow more than one acceptable interpretation, and in controversial areas of law various conflicting opinions may be considered relevant, cogent

⁴³³ See above at 3 3 1.

⁴³⁴ In his inaugural lecture held in 1921 the Swiss Law Professor Fritzsche rightly observed: "*Man stellt sich vor, dass er die auf jeden vorkommenden Fall passende Gesetzesschablone im Kopf habe, den betreffenden Paragraphen aus dem Gedächtnis müsse hersagen können, und dass damit die Sache getan sei. Eine naiv-falsche Vorstellung vom Wesen juristischer Tätigkeit!*" Included in Fritzsche, *Richteramt*, 388.

or arguable. In such cases it is sometimes practically impossible to verify objectively the ‘law’ that the judicial officer in question has allegedly broken.

Apart from cases where the judge’s decision is clearly against the law, the judgement is wrong if it is subsequently properly overruled by a higher court. Where, for example, a statute allows two interpretations and the judge *a quo* chooses the first interpretation as the basis of his judgement while, on appeal, the second judge prefers the other interpretation: because of the hierarchy of the courts and the fact that the superior court’s decision becomes an authoritative source of law, the decision of the judge *a quo*, though excusable, may now be said to be wrong.

A second aspect is of great weight in cases of ambiguous legal sources. It must be asked whether or not the judicial officer made his decision in accordance with the commonly accepted methods of legal interpretation and in accordance with the legal convictions of society. This approach emphasises the specific duties and obligations of judicial officers. Consequently, wrong judgements might also entail an unacceptable exercise of judicial power.⁴³⁵ This focus on compliance with judicial duties, at least in cases of ambiguous legal sources, is consistent with the approach advocated by the great Hugo Grotius in his *Inleidinge* 367 years ago:

“A judge who decides contrary to laws which it was his duty to know or grants an adjournment contrary to law...though [he] may have acted in ignorance, [is] liable for any damage which any one may incur in consequence.”⁴³⁶

Employing the criterion of the reasonable man, in respect of modern law, it may be asked whether the reasonable judge who was true to his duty by applying the normal methods of interpretation and discovery of the law would come to an identical conclusion. This is an interesting consideration. However, it must be noted that considerations as to the reasonableness of the judge’s behaviour relate rather to the question of fault or, more specifically, to the question of negligence. They should not interfere with determination of the element of wrongfulness.⁴³⁷

⁴³⁵ Some of these wrongs have been accepted as grounds of review. Section 24 Supreme Court Act of 1959 states: “...proceedings of any inferior court may be brought under review [in the case] of...interest in the cause, bias, malice or corruption on the part of the presiding officer.”

⁴³⁶ *Inleidinge* (1926), 3.37.9.

⁴³⁷ See below at 3 5 2 3 (a). One decisive difference between the test of wrongfulness and the test for negligence is that the former relates to the conduct of the wrongdoer, while the negligence test determines the legal blameworthiness of the defendant for his wrongful conduct. See *Neethling et al, Law of Delict*, 143 for more details.

However, even if a judgement is objectively wrong according to the above criteria it does not necessarily follow that the judgement is a wrongful one.

3 5 2 2 *The requirement of state of mind: improper motive and the doctrine of abuse of right*

(a) *The established criterion: improper motive*

Practically all the emphasis in the case law analysed in the preceding chapter as well as in the academic literature since the latter half of the nineteenth century has been on the question of the state of mind of the judge. The requirement that judgements should be wrong has been overlooked or, at any rate, taken for granted. This might be due to failure to draw a clear line between wrongfulness and fault. It also suggests that judges and commentators thought that what constituted a wrong judgement was so obvious that it needed no further elaboration.

Be that as it may, as the law now stands judicial liability (and wrongfulness) is established only where the judge was actuated by an improper motive. One may ask, however, whether the liability of judges should be made to depend on improper motive as opposed to some other subjective mental requirement.

To understand its application to the question of judicial liability – and to appreciate the advantages of an alternative approach – the criterion of improper motive must be seen in its broader dogmatical context within the law, as well as in relation to the historical development which has already been traced. Two aspects must be examined: first, whether the motive criterion bears any relationship to the so-called doctrine of abuse of right⁴³⁸, which might be used to provide a satisfactory theoretical basis for it; and secondly, whether an application of the doctrine of abuse of right and the motive requirement are a suitable test of wrongfulness.

(b) *The relationship of the motive requirement and the doctrine of abuse of right*

The doctrine of abuse of right applies principally in private and in administrative law.⁴³⁹ Its underlying premise is that the exercise of a right or a power may take place in a manner or circumstances that render such exercise wrongful. In such a case, a right holder exercises his or her rights in a legally reprehensible manner and, hence, abuses those rights. In practice, this is ascertained by investigating motive: an otherwise lawful act will be unlawful if done with an

⁴³⁸ Neethling *et al*, *Law of Delict*, 104-110; Boberg, *Delict*, 206-210; Midgley, *Delict*, 68.

⁴³⁹ Baxter, *Administrative Law*, 515-517; Wiechers, *Administrative Law I*, 340.

improper motive. Improper motive is generally defined more broadly than mere ill will, spite, ulterior motive or malice, which are, more specifically, the terms frequently used by the courts with respect to judicial liability. Such motive is present when a person acts with the sole motive of harming another without advancing a significant interest of his own (*ad aemulationem, animo vicino nocendi*)⁴⁴⁰, or with a motive other than an authorised one.⁴⁴¹

Academics have advanced varying views on many details of this doctrine. However, all this ‘semantic quibbling’, as Professor Boberg puts it, need not be elaborated on.⁴⁴² Of relevance to our subject are those differences of opinion as to whether or not the doctrine of abuse of right enjoys general application in law. According to some, wrongfulness is always determined by the criterion of reasonableness, namely the objective reasonableness of the conduct in question. As improper motive is generally indicative of unreasonableness, the doctrine of abuse of right is inherently applicable.⁴⁴³ Others are of the opinion that this doctrine does not apply as a general rule throughout the law. It is argued that motive is restricted in its application to those few instances where competing interests or rights of equal merit clamour for equitable resolution.⁴⁴⁴ Recourse to objective reasonableness is unnecessary where the law already balances the different interests or rights at stake and a decision is made within the categories into which the underlying aspects of reasonableness have crystallised.⁴⁴⁵

To date the doctrine of abuse of right has been recognised by the courts as a determinant of wrongfulness in the areas of: the law of neighbours; defamation on a privileged occasion (relevant for judicial officers⁴⁴⁶) as well as in fair comment; malicious prosecution or wrongful

⁴⁴⁰ Van der Merwe and Olivier, *Onregmatige Daad*, 64; Midgley, *Delict*, 51, 68.

⁴⁴¹ Boberg, *Delict*, 208.

⁴⁴² Boberg, *Delict*, 206.

⁴⁴³ In favour of the view that improper motive is capable of universal application, see Neethling *et al*, *Law of Delict*, 106-108. References are deduced from the field of the law of neighbours. However, the authors stress that: “The doctrine [of abuse of right] is not restricted to neighbours but enjoys general application in the law of delict.” The authors then continue to observe *inter alia*: “The doctrine of abuse of rights entails the basic question whether or not the defendant acted wrongfully.” And: “...conduct with the exclusive aim of harming a neighbour (*animus vicino nocendi*) is, as a general rule, wrongful.” See also Van der Merwe and Olivier, *Onregmatige Daad*, 68. With regard to case law see generally *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) 107-108. Further Neethling *et al*, *Law of Delict*, 106 fn449.

⁴⁴⁴ Boberg, *Delict*, 208.

⁴⁴⁵ Boberg, *Delict*, 209: “...categories of wrongfulness have been crystallised by the courts... motive is relevant only in the few categories mentioned.” Therefore “...[t]he doctrine is...not of general application, though its application may be extended to new areas not yet covered by authority...”

⁴⁴⁶ *Bosman v Bisset* (1881) SC 319; *May v Udwin* 1981 (1) SA 1 (A).

imprisonment (relevant for judicial officers⁴⁴⁷) and, finally, in the attachment of property.⁴⁴⁸ Even though decisions so far relate only to quasi-judicial bodies⁴⁴⁹, there are strong indications that the courts would also apply the doctrine of abuse of right to establishing the bounds of official authority for wrongful misjudgements. A number of academics definitely share this view.⁴⁵⁰

Although improper motive is of great importance to the doctrine of abuse of right, generally it may not be considered the sole determinant of liability under the doctrine. The other determining factor is an objective enquiry into the pertinent interest of the perpetrator: the perpetrator's interest in exercising his rights (eg., the right of ownership, the right to make comments, the right to chastise a child, etc) is weighed against the interest of his opponent (eg., the neighbour, the child, etc). The extent of the perpetrator's interest is limited by the rights and interests of others. Consequently, improper motive alone is insufficient to convert lawful conduct into a wrongful act.⁴⁵¹

From the case of *May v Udwin*, however, it appears that the additional objective requirement of absence of the perpetrator's interest is inapplicable with regard to liability of judicial officers. In *May v Udwin*, the Appellate Division made it abundantly clear that it considered those criteria other than malice used by the Cape Provincial Division (in *Udwin v May*) to determine the liability of judicial officers as generally irrelevant for the determination of liability under the *actio iniuriarum*. These additional criteria were 'irrelevance of the defamatory matter to the proceedings' and the 'absence of reasonable foundation for the statement'.⁴⁵² It is evident that these criteria match the additional objective test of the absence of perpetrator's interest required under the doctrine of abuse of right.⁴⁵³ It is safe, therefore, to argue that according to the courts,

⁴⁴⁷ *Penrice v Dickinson* 1945 AD 6; *Moeketsi v Minister of Justice* 1988 (4) SA 707 (T).

⁴⁴⁸ For an overview see Boberg, *Delict*, 206, 208; Neethling *et al*, *Law of Delict*, 106 fn449; Midgley, *Delict*, 68.

⁴⁴⁹ *The Cape of Good Hope Bank v Fischer* 4 SC (1886) 368; *Matthews v Young* 1922 AD 492; *Lucas v Wilkinson* 1926 NPD 10; *Abrahamse v Phigeland* 1932 CPD 196; *Cohen v Committee of Harrismith Hebrew Congregation* 1924 OPD 25; *Tvl Coal Owners Association v Board of Control* 1921 TPD 447; *Hoffman v Meyer* 1956 (2) SA 752 (C).

⁴⁵⁰ Neethling *et al*, *Law of Delict*, 99-100, 106 fn449 and *THR-HR* 52 (1989), 468; Midgley, *Delict*, 75.

⁴⁵¹ Generally *Gien v Gien* 1979 (2) SA 1113 (T) 1121; Neethling *et al*, *Law of Delict*, 109 (d) and (c); Van der Merwe and Olivier, *Onregmatige Daad*, 68-69. From Boberg, *Delict*, 207 and 209 it cannot be deduced whether he approves this notion.

⁴⁵² See above at 3 2 1 3.

⁴⁵³ In *May v Udwin* 1981 (1) SA 1 (A) 20 (D) the court made it clear that these objective criteria are at most *indicative* of improper motive. The lack of significant interest, however, applies to the other parties to a case, for instance advocates, attorneys, witnesses or litigants. In addition see Burchell, *Defence of Privilege*, 178 and 181 *et seqq.*

at least with regard to judicial liability under the *actio iniuriarum*, improper motive alone is considered as determining the wrongfulness of a misjudgement

Whatever view is correct with regard to the general or more specific application of the doctrine of abuse of right within the question of wrongfulness, the doctrine undoubtedly applies only where there is a conflict of interests between two competing rights of equal merit.⁴⁵⁴ Ultimately, all authors agree that the application of the doctrine of abuse of right entails the application of a value judgement. Professor Boberg calls this a “...delicate balancing of the...rights of the aggrieved individual against the interests of society.”⁴⁵⁵ Professor Neethling refers to “...a weighing-up of the benefits which the exercise of his right has for the defendant, against the prejudice suffered by the plaintiff...”.⁴⁵⁶ Consequently, it would be superfluous to engage in the highly complex process of determination of an abuse of right if it were evident that one party’s rights or interests could be ignored or do not even exist – where, in other words, wrongfulness is determinable even without the application of a value judgement. Seen in this light, Boberg’s solution of a somewhat restricted application of the doctrine of abuse of right is indeed the better one.

With respect to judicial liability, therefore, the initial question must be whether or not a value judgement must be applied. It will be argued in what follows that, to a large extent, there is no point in maintaining that a conflict exists between the rights and interests of judicial officers (more broadly, of society) and the rights of the individual, as required for the application of a value judgement. Or, to put it differently, the doctrine of abuse of right and, consequently, the motive requirement should have only restricted application to the question of judicial liability.

(c) *The motive requirement’s general suitability for the determination of judicial liability*

(i) *The parties’ rights at stake: arguments in favour of the motive requirement*

In order to assess whether there actually is a conflict of rights, it is necessary first to elaborate on what rights and interests of the judiciary and of the individual are at stake with regard to judicial liability. The rights of the injured party are generally easy to determine. Either the right of

⁴⁵⁴ This appears from Boberg, *Delict*, 207 as well as from Neethling *et al*, *Law of Delict*, 106.

⁴⁵⁵ Boberg, *Delict*, 207.

⁴⁵⁶ Neethling *et al*, *Law of Delict*, 106.

personality, more precisely the right to *fama*, *dignitas* or *libertas*, or the right of property is at stake. The rights or interests of judicial officers are more difficult to define. These are institutional rights rather than personal rights. Hence, considerations of public policy are of significance for a proper determination of the conflict of rights.

Little attention has as yet been paid to the aspect of public policy in the South African *usus hodiernus* of judicial liability. This appears to be the right place to make up for the deficiency. In this respect, however, it is necessary to distinguish between liability for defamation in court and liability for wrongful misjudgements and wrongful imprisonment.

(α) *Defamation in court*

With regard to judicial wrongdoing through defamation, it is thought by some that judicial officers should as a matter of policy be free from fear of the threat of liability by means of restricted liability in delict. Joubert JA in *May v Udwin* stated that:

“Qualified privilege is founded on public policy. This is especially so with the qualified privilege of a judicial officer: Public interest in the due administration of justice requires that a judicial officer, in the exercise of his judicial functions, should be able to speak his mind freely without fear of incurring liability for damages for defamation.”⁴⁵⁷

Undoubtedly, the independence of judicial officers in their quest for truth appears to be a crucial factor. Openness in judicial proceedings is also of considerable importance, as appears from the remarks of De Villiers CJ in *Bosman v Bisset*:

“It is the clear policy of our law...to impose no unnecessary fetters upon the freedom of Judges and Magistrates to comment upon all cases brought judicially before them, and upon the conduct of all persons concerned in those cases.”⁴⁵⁸

It is in the interest of proper administration of justice that freedom of speech in court should be upheld to enable the courts to make the most objective decision possible. What is further envisaged is the furnishing of the judicial officer with sufficient authority to uphold the dignity of the court and to protect the proper administration of justice by the courts, in other words, to guarantee the functioning of the courts. No one could possibly argue that these considerations of public policy are not in the interests of society at large. It is accepted that the individual's right to *fama* in court should be and is subject to the restrictions indicated above. It is not the defamatory remark as such that is privileged, but the occasion and place where it is uttered by a judicial officer.

⁴⁵⁷ 1981 (1) SA 1 (A) 19 (H).

⁴⁵⁸ 1 SC (1881) 319 at 323.

With regard to judicial wrongdoing through defamation, therefore, there exists a conflict between the rights and the interests of the judiciary (as well as society at large) and of the individual who has been defamed in court. Consequently, the doctrine of abuse of right is generally acceptable in order to determine the wrongfulness issue. In the light of the foregoing, to apply the value judgement to cases of judicial defamation in court means that the interests and rights of the judiciary prevail over those of the individual, unless the individual can prove improper motive on the part of the judge. The application of the motive requirement is thus called for in cases of defamation in court to achieve what I call an acceptable restriction of judicial liability.

(β) *Wrongful misjudgement and wrongful imprisonment*

Similar arguments are advanced by those who support the view that the doctrine of abuse of right and the motive requirement applies to other instances of judicial wrongdoing, namely wrongful imprisonment or wrongful misjudgement. Essentially, it is argued that in regard to the giving of wrong judgements there is a need for the same reasons of policy to weigh the interests and rights of the judiciary and society against those of the individual. Acting in a judicial capacity requires the judge to exercise his discretion as judiciously and impartially as possible. The threat of a possible delictual action might negatively influence the judge's decision in one way or another.

A second argument – familiar in light of the historical development – is based on an application of the principle of *res iudicata facit ius*.⁴⁵⁹ There are sufficient ways of protecting a party from the consequences of a wrong judgement, namely review and appeal. Once a decision is final, however, it becomes *res iudicata* and assumes ultimate legal authority. Clearly, a delictual action would challenge and undermine this authority. To put it differently: how could an act which creates the law (final decision) cause a result which is against the law? The policy consideration upon which this principle is based is, of course, the achievement and protection of legal certainty and of peace: A point is reached where the interest of society in the effectiveness of administration of justice requires an end to litigation.

⁴⁵⁹ Compare, for example, the dictum by Coke CJ in *Floyd v Barker* (1607) 77 ER 1305 at 1306-1307 where he stressed the fundamental importance of the finality of judicial judgements to the public interest.

Consequently, the prevailing opinion argues that to restrict judges' delictual liability for wrongful misjudgement and wrongful imprisonment to cases of an abuse of right (wrong judgement given with an improper motive) ensures confidence in the independence of the judiciary and puts an end to fruitless litigation.

These are indeed valuable and plausible arguments for restricting judicial liability. Whether they dictate that liability should be imposed only in the case of improper motive, however, is another matter. There are a number of arguments which can be raised against this view. The following arguments can be classified as practical, constitutional or historical, according to their nature:

(ii) *Arguments against the motive requirement in cases of wrong judgements*

(α) *The difficulty of leading sufficient evidence*

The first argument to be considered against the motive requirement is the difficulty of proof of improper motive on a balance of probabilities. In one of the most important decisions in recent years in the field of defamation, Hoexter JA observed that the question of allocating the onus of proof is a policy consideration that has a decisive primary impact on the general outcome of delictual actions.⁴⁶⁰

It is submitted that the same applies to the question of what has to be proved here. Owing to the extremely subjective nature of the concept, it is very difficult for an individual to prove malicious or improper motive on the part of a judicial officer.⁴⁶¹ To recap: motive generally indicates the reason for conduct.⁴⁶² It must not be confused with intent, which can be defined as wilful acts or omissions the wrongdoer knows to be wrongful. Motive is a subjective concept which refers to the reason, object, desire, or sense *behind* the enactment of will. Intention denotes the manifestation of the will rather than the wish or desire. From this it follows that improper motive is more restricted in its application than is intention. A person who intentionally kills someone does not necessarily act with an improper motive. For instance, intention but not malice is present in the killing of a terminally ill person to spare him or her further suffering.⁴⁶³

⁴⁶⁰ *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 1 SA 708 (A) 777 per Hoexter JA. Similar considerations by Schmidt in *SALJ* 102 (1985), 583.

⁴⁶¹ Burchell, *Defence of Privilege*, 180.

⁴⁶² Generally to the following see Van der Walt, *Delict*, 60-65; Neethling *et al*, *Law of Delict*, 116-121; Van der Merwe and Olivier, *Onregmatige Daad*, 115-126; Boberg, *Delict*, 268-274; Baxter, *Administrative Law*, 617-618.

⁴⁶³ Neethling *et al*, *Law of Delict*, 120.

In *Esterhuizen v Administrator Tvl. Bekker J* stated:

"In my view, however, intent and motive are different concepts, and the fact that that the motive...might be laudable does not negate the fact that the intention...might nevertheless be wrongful."⁴⁶⁴

Consequently, it is argued that it is easier to prove the somewhat wider element of intention or *dolus* than the narrower element of improper motive. The plaintiff is freed from having to descend into the mire of inquiry into motive, spite or ill-will.⁴⁶⁵ The apparent difficulties a plaintiff has to face proving an improper motive on the part of the defendant, who, moreover, is not an ordinary defendant but a judicial officer, sometimes even a superior court judge, renders any theoretical balance of equity between the plaintiff and the defendant a hollow fiction. The fact that in *May v Udwin* the court made some concessions when it accepted that irrelevance of the matter or the absence of reasonable foundation was indicative of malice⁴⁶⁶, is a strong indication of the overwhelming difficulties a plaintiff faces in establishing improper motive.⁴⁶⁷

In fact, it seems there is some point in arguing that South Africa's qualified protection from liability is in practice very close to the absolute protection enjoyed by English judges for centuries. In other words, for practical purposes, the question of the application of the motive requirement is very nearly congruent with the question of whether or not there should be judicial liability at all.

A further argument may be adduced in this respect. Consider the American case of *Stump v Sparkman*. The mother of a fifteen-year-old child presented a petition to a state court judge alleging that her allegedly retarded daughter had spent nights with men and that she should be sterilised to prevent 'unfortunate circumstances'.⁴⁶⁸ However, the girl's high school record, which the judge did not consult, indicated that in all probability she was not retarded.⁴⁶⁹ The judge did not file the petition with the court, gave no notice to the daughter, held no hearing and approved the petition immediately. Eight days later the girl was sterilised on the pretext that she was receiving an appendectomy. Only after she married did she realise that she had been sterilised two years earlier. No such case has taken place in South Africa thus far; and in many

⁴⁶⁴ 1957 (3) SA 710 (T) 722.

⁴⁶⁵ Mac Millan, *SALJ* 92 (1975), 160.

⁴⁶⁶ *May v Udwin* 1981 (1) SA 1 (A) 20 (D); Burchell, *Law of Defamation*, 252.

⁴⁶⁷ See in addition Neethling *et al*, *Law of Personality*, 160-161, 162 fn198.

⁴⁶⁸ 435 US 349 (1978). For a discussion see Roth and Hagan, 1984 *JFCJ*, 5.

⁴⁶⁹ *Ibid.* at 351.

cases no doubt appeal and review proceedings do provide a remedy, and the principle of *res judicata* rightly puts an end to litigation. However, it is argued in the light of *Stump* that additional litigation sometimes is necessary for a victim of judicial wrongdoing. It is questionable then whether redress in cases of irreparable loss (by means of appeal or review) should hinge on the frequently overwhelming difficulty of proving improper motive on the part of the judicial officer.

(β) *Constitutional arguments against the motive requirement*

Practical obstacles to lead evidence have consequences, particularly with regard to constitutional aspects. The approach, followed by the courts and the majority of the legal academics, to apply improper motive as the essential determinant of wrongfulness leads to an exceptionally problematic result: under certain circumstances judicial officers are granted the right to breach the law without having to fear any consequences.

It is true that every justification ground renders *prima facie* unlawful conduct lawful at the outset.⁴⁷⁰ Seen from this point of view, any (objectively) wrong judgement is a wrong judgement only in a technical and not in a delictual sense. Consequently a judge whose conduct is justified is not breaking the law: the judgement is wrong but not deliberately wrongful.

Although the above is the generally accepted position of the law with regard to wrongfulness, it may be questioned whether this approach should be adopted in the case of judicial liability. The application of the motive requirement as the essential route to rebut the justification grounds of judicial officers and the near impossibility of a plaintiff's proving improper motive on the part of the judge has created a situation in South Africa where judicial officers may render wrong judgements without any real fear. The difficulty of leading sufficient evidence results in there being in practice no wrong judgements in a delictual sense, although *de facto* there may be some.

It is worth questioning whether this discrepancy between reality and legality is acceptable, or whether it is not, rather, in the interests of the authority of the state and the credibility of the judiciary to remove this negative consequence of the application of the motive requirement by employing an alternative requirement. This question is of particular relevance in light of recent constitutional developments.

⁴⁷⁰ Neethling *et al*, *Law of Delict*, 39 fn44.

It is trite but true that wrong judgements contravene not merely the rights and interests of an individual; they jeopardise the interests of society at large. This becomes abundantly clear if one takes into account that South Africa now is a constitutional state, a *Rechtsstaat*.⁴⁷¹ In the modern constitutional state, the law is generally the most fundamental determinant of the proper functioning, even the survival, of the state. The state uses the law as the central means of upholding and maintaining internal order. Thus, all are bound by the authority of the law. This proposition applies to all the organs of the state alike, including the judiciary.

The law has general application.⁴⁷² It is submitted that the constitutional state risks its credibility and authority if it allows any officer of the state to act contrary to the law without subjecting him or her to same consequences as any other individual, namely liability (civil, criminal, or disciplinary). It is the special task of the judiciary to ensure that all individuals, juristic persons or organs of state act in conformity with the rule of law.⁴⁷³ It is of exceptional importance to the constitutional state that the judiciary should itself act in accordance with the rule of law.

Adjudication is a supreme governmental activity. As Steyn JA once said, "...[T]he judicature is...an integral part of the State. It is the State acting through its judicial organs."⁴⁷⁴ Judges wield impressive power. The consequences of wrong judicial decisions for the individual's rights of personality, liberty, property and, until recently, even life, can be severe. The judiciary's right to immunity is a right that should be granted with the utmost circumspection. As Professor Labuschagne has stated: "*Dit is 'n bekende historiese feit dat ongekontroleerde mag die voedingsbron van tirannie en onderdrukking is.*"⁴⁷⁵ Some years ago Edwin Cameron quoted Lord Devlin thus:

"It is a great temptation to cast the judiciary as an elite which will bypass the traffic-laden ways of the democratic process. But it would only apparently be a bypass. In truth it would be a road that would never rejoin the highway but would lead inevitably...to the totalitarian state."⁴⁷⁶

In light of South Africa's immediate past, the new Constitution is aimed at prohibiting any such possibility of abuse due to uncontrolled use of power. It is an essential aspect of the rule of law that there should be means of redress available to the individual for wrongs committed by any

⁴⁷¹ Basson, *Interim Constitution*, xxvii; Beukes, 1997 *Consultus*, 129.

⁴⁷² Section 1 (c) together with ss 8 (1) and 7 (1) and (2) of the Constitution.

⁴⁷³ Section 165 (2) together with s 8 (1) of the Constitution.

⁴⁷⁴ *Lekhari v Johannesburg City Council* 1956 (1) SA 552 (A) 566 (C)-(D).

⁴⁷⁵ At *THR-HR* 59 (1996), 479.

⁴⁷⁶ *SAJOHR* 6 (1990), 253.

organ of state. The obligation to act in conformity with the law has been made perfectly clear in the Constitution in s 165 (2):

“The courts...are subject only to the Constitution and the law, which they must apply impartially and without fear, favour and prejudice.”

and in the judicial oath which all judicial officers must take:

“I swear that as a judge...I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.”⁴⁷⁷

The Constitution, in s 37, provides for the only conceivable exception to this principle of observance of the law by an officer of the state, namely a state of emergency. But even here we read, in s 5:

“No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or any other action taken in consequence of a declaration, may permit or authorise (a) indemnifying the state, or any person, in respect of any *unlawful* act...”⁴⁷⁸

The possibility of judges rendering wrong judgements without facing sanctions raises not only the question of the credibility of the judiciary. There arises also the question how to hold judges properly responsible. Another important aspect of the argument of rule of law is, therefore, the aspect of judicial accountability. From Juvenal’s question “Who watches the watchmen?” it is clear that the judiciary as much as the executive and legislature requires control. Judicial obedience to the rule of law can be enforced, or rather controlled, only by accountability. Seen from this angle, judicial liability must be regarded as an alternative to other means of control. Institutionally, there are provisions in the Constitution and in national legislation with regard to selection, appointment and dismissal of judicial officers. Technically, there are means of appeal and review and, with regard to publicity, open court sessions as well as academic and public criticism.⁴⁷⁹

It is only in recent years that the importance of judicial accountability has attracted the attention of the legal fraternity in South Africa.⁴⁸⁰ However, of those writers who have worked in this

⁴⁷⁷ Schedule 2 item 6 (1) Constitution.

⁴⁷⁸ My italics.

⁴⁷⁹ Cameron, *SAJOHR* 6 (1990), 253, furthermore see above at 1 2 2.

⁴⁸⁰ See *inter alia* Cameron, *SAJOHR* 6 (1990), 253 and *Judicial Accountability*, 181-199; Rautenbach and Malherbe, *Constitutional Law*, 234-236; Labuschagne, 1993 *De Jure*, 347 and *THR-HR* 59 (1996), 479; Corder, *SA Public Law* 7 (1992), 181-193. Meanwhile the discussion on judicial accountability seems to have also reached the conscious minds of the superior court judges as appears from the words of Mr Justice I Mahomed at an address at the first orientation course for new judges held at Magaliesberg on 21 July 1997, included in *SALJ* 115 (1997), 114.

field, only two acknowledge judicial liability as a specific means of accountability.⁴⁸¹ This, it is submitted, is regrettable since delictual liability is a particularly useful and important aspect of judicial accountability. The uniqueness of judicial liability lies in that it is the sole control device within the power of the legal subject that suffered the wrong. Apart from appeal or review procedures, it may be described as a means by which the individual acts in the interests of society at large. Hence, with regard also to the need for judicial accountability, it seems that, to uphold the authority of the state and to protect the rule of law, the field in which judicial officers may adjudicate wrong judgements without fearing any delictual consequences should remain as restricted as possible. Or, at least, more restricted than appears to be the case on the basis of the present motive requirement.

In this context, however, it should not be overlooked that the application of the motive requirement serves a legal-political purpose. The aim of restricting judicial liability by means of the sweeping motive requirement is to protect judicial officers from constant fear of delictual liability and thereby to ensure judicial independence.⁴⁸² It must be recognised that the judiciary has a peculiar position within the state, its task being to apply the laws impartially, fearlessly and without prejudice. In other words, the key to its success is independence. Judicial independence – from the parties in court, from the executive, from the legislature and from society at large – may without exaggeration be described as a cornerstone of the rule of law.⁴⁸³ Acknowledging the need for judicial independence means that it is essential that judicial accountability is not mistaken for judicial subordination. The necessity of protecting the judiciary's independence and upholding its functionality, dignity and authority are important and complex issues, and one does not have to go back too many years in the South African context to appreciate the delicateness of the contention that judicial autonomy must be respected by other organs of state. As Edwin Cameron has remarked:

⁴⁸¹ Rautenbach and Malherbe, *Constitutional Law*, 236 and Labuschagne, *THR-HR 59* (1996), 479 *et seqq.* For more traditional views see again Corbett, *SALJ* 105 (1997), 20 and Froneman J in *Matiso v Commanding Officer, Port Elizabeth Prison, & another* 1994 (4) SA 592 (SE) at 598.

⁴⁸² See again above at 3 5 2 2 (c) (i) (α) and (β).

⁴⁸³ It has been indicated in chapter V 4 1 3 3 that the ideas of judicial independence and separation of powers were introduced to political philosophy as late as the Age of Enlightenment by Montesquieu in his famous *L'Ésprit des Lois*. And it was only from the beginning of the nineteenth century that the image of the modern independent judge began to take shape. A useful contribution in this respect is provided by Labuschagne, 1993 *De Jure*, 359-360 with numerous references in fn85.

“Constitutional structure as much as ethical propriety indicates that judges should be substantively and formally autonomous in relation not only to the other arms of government but to the competing interests in the public or private sector over whom they may be called to adjudicate.”⁴⁸⁴

A restriction of judicial liability in order to protect the independence of the judiciary is necessary mostly because of judicial officers’ fear of reprisal. This fear may not be dismissed as a chimera. Consider the interests of an international oil giant which is sued by a handful of fishermen for damages due to an off-shore operation which devastated the base of their income. It is easy to see the danger that a judge presiding over the case with the knowledge that the losing enterprise might possibly institute a retaliatory action against him, could rule against the fishermen to escape this threat.⁴⁸⁵ Another example could lie in the case where a judicial officer is subject to wrong imputations in the public or in the press that he or she will adjudicate or has adjudicated wrongly. These examples, and there are many more, indicate that judicial independence is indeed an essential aspect of the proper functioning of the legal order.

To summarise: From what has been said so far, it is obvious that the ambit of judicial liability must be determined by balancing three competing interests. In the first place, the independence of the judiciary and its freedom from undue influence must be protected from too wide a scope of judicial liability. Furthermore, it is necessary to prevent harassing or vexatious actions which would undermine the authority of the judiciary, as well as its efficiency. The second interest at hand is that of the individual, who must be given adequate means of protection from unlawful judicial conduct as well as a proper basis for compensation.

It is obvious that striking a proper balance between these two interests is a very difficult task and is subject to differing priorities. Meanwhile, no one would claim that the principle of judicial independence exists exclusively for the sake of the courts or the judicial officers. Judicial independence is not supposed to be the personal privilege of judicial officers. On the contrary, it serves ultimately to ensure the freedom of the citizen vis-a-vis the state. The real reason for protecting judicial independence is that it serves the people, who should receive judgements only from independent judges.

We come, thus, to the third interest: the public interest. It is important that the judiciary acts in conformity with the precepts of the Constitution, i.e., impartial administration of justice and prevention of abuse of power.

⁴⁸⁴ *SAJOHR* 6 (1990), 252.

⁴⁸⁵ Cohen, *CWLR* 41 (1990), 270.

If, therefore, one is to understand judicial independence as essential for the efficient and just rule of the legal order, as a service to the law and not merely for the benefit of the judiciary, it becomes evident that the laudable protection of judicial independence has to be limited where a judicial officer himself does not serve the law but instead obstructs the legal order from within. Only the proper endeavour of following the normal process of adjudication should be protected. Thus, protecting judicial independence by means of the motive criterion does not take sufficient account of the fact that the Constitution in ss 2 and 165 (2) imposes a positive duty on the judiciary to act in conformity with the rule of law, whereby judges are obliged to adjudicate in a fair, just and correct manner.

Taking into account these considerations, there is good cause to argue that the delicate question of judicial liability within the law of delict must be reinterpreted in the light of the newly introduced Constitution. The Bill of Rights, particularly, serves what is referred to as its dual role: at first, as part of an enquiry for determination whether or not the rules affecting the parties are (constitutionally) valid. Secondly, the provisions enshrined in the Bill of Rights are part of the wrongfulness enquiry, which determines the nature and extent of the rules. With respect to the influence of the Bill of Rights, Professor Burchell's statement stands also with respect to judicial liability, namely that judges and academics have to be able to resolve disputes where common-law rights, such as the judiciary's malice-based qualified privilege, confront constitutionally entrenched rights, namely the positive duty imposed on the organs of state, i.e., the judiciary, to act in conformity with the law.⁴⁸⁶ In the passage that follows, Professor Burchell predicts that the Constitutional Court:

"... will obviously be more ready to draw inspiration from the Bill of Rights in claims for damages against governmental officials or bodies for the infringement of individual rights. It is clear, however, that the provisions of a Bill of Rights will only be directly relevant where there is some 'governmental connection' since a Bill of Rights is essentially designed to prevent or control governmental abuses of power."⁴⁸⁷

In my eyes, there is no reason to doubt the 'governmental connection' of the whole process of adjudication into which judicial officers are involved.

(γ) *The historical argument against the motive requirement*

There remains the historical argument against the motive requirement. The application of the concept of improper motive to cases of wrongful misjudgements and wrongful imprisonment

⁴⁸⁶ Taken from Burchell, *Principles*, 13. With regard to the impact of the Bill of Rights on the future law of delict see also Midgley, *Delict*, 18 and 52.

⁴⁸⁷ *Ibid.* Furthermore see Midgley, *Delict*, 52.

appears, with respect, to be ahistorical. With regard to the liability of judicial officers under the *actio iniuriarum* for defamation, however, it appears that South African courts and academic writers are correct in holding that in Roman-Dutch law an improper motive was the decisive criterion in holding a judicial officer liable. It is true that the relevant Roman-Dutch authorities (Huber, Kersteman, Van der Keessel, Voet) do not give precise criteria by which to determine whether a judicial officer had abused his authority.⁴⁸⁸ There is certainly no indication of *dolus* within the relevant passages, and, indeed, De Villiers CJ (in 1881) and Joubert JA (in 1981) correctly held that in Voet's commentary the phrase *ad concitandam invidiam atque infamiam* emphasised improper motive rather than intention.⁴⁸⁹

However, the same conclusion with respect to cases of liability of judicial officers for wrongful imprisonment or wrongful misjudgements is not as convincing.⁴⁹⁰ To base the use of the good faith criterion in this case exclusively on Roman-Dutch authorities is an interpretation which is not in accordance with the law as it was then. *Moeketsi*'s case is probably the best and most recent illustration.⁴⁹¹ In *Moeketsi*, the court interpreted the old authorities as having used the term *dolus* in the sense of motive and held that this applied also to modern South African law: "*Hierdie gemeenregtelike beginsels is in die Suid-Afrikaanse reg opgeneem...*".⁴⁹² Van Zyl J translated the Latin term *dolus* as meaning *bedrog* or *bedrieglike optrede*.⁴⁹³ In English, *bedrog* means deceit, fraud.⁴⁹⁴

An essential part of the preceding chapters of detailed historical analysis was devoted to assessment of the extent to which judicial liability was determined by fault, particularly *dolus*. As early as Roman law, *dolus* had come to have a number of meanings. Two in particular crystallised as the most important with regard to judicial liability: Firstly, *dolus* in the more neutral sense of intention, *opset*, or, in German, *Vorsatz*, as opposed to mere *culpa*, that is negligence, *nalatigheid* or *Fahrlässigkeit*. Secondly, *dolus* as a requirement of the *actio de dolo*; here *dolus* bore the meaning of a particularly reprehensible state of mind, also described by

⁴⁸⁸ At least with regard to liability for defamation. See above at 3 2 1 and chapter V 5 2 1.

⁴⁸⁹ *Bosman v Bisset* (1881) SC 319 at 323; *May v Udwin* 1981 (1) SA 1 (A) 16 (H).

⁴⁹⁰ *Matthews v Young* 1922 AD 492; *Penrice v Dickinson* 1945 AD 6; *Moeketsi v Minister van Justisie* 1988 (4) SA 707 (T).

⁴⁹¹ The critique applies to any of the other judgements as well.

⁴⁹² *Moeketsi v Minister van Justisie* 1988 (4) SA 707 (T) 713 (D).

⁴⁹³ *Ibid.* at 711 (G) and 712 (A) and (D) with regard to Groenewegen, 712 (H) and (J) and 713 (B) with regard to Voet.

⁴⁹⁴ *Juta se Sakwoordeboek*, 24.

*calliditas, fallacia, machinatio, or circumvenio*⁴⁹⁵, that is by craftiness, artfulness, fraud, deceit, *bedrog*, or *Arglist*.

Under Roman-Dutch law, however, lawyers no longer drew as clear a distinction between the two concepts of *dolus*. The lack of uniformity in the definition of the fault requirement in Roman-Dutch law is confusing⁴⁹⁶ although any uncertainty can be quickly resolved: Those authors who referred to *dolus atque calliditas*, *bedrog* or *arglist* accepted the *actio de dolo* as the appropriate action. Those who referred to *dolus*, *dolus malus*, *opzet* or *boos opzet* favoured the *actio legis Aquiliae* in holding a judge liable. Consequently, the former all argued that judicial liability was for *dolo* misjudgements only. In their turn, those authors who favoured the *actio legis Aquiliae* referred either to liability for *dolus* or *dolus* and *culpa lata*. The apparently ambiguous terminology, therefore, resulted from subsequent application of the two pertinent actions in the field of judicial liability in Roman Dutch law.

In light of this historical development, it was certainly not incorrect of the court in *Moeketsi* to give the term *dolus* the meaning of *bedrog* or *bedrieglike optrede*, that is deceit or fraud. However, this might have been somewhat one-sided and too restrictive since Roman law, the Glossators and Commentators and, eventually, a number of Roman Dutch authorities employed not the *actio de dolo* but the *actio legis Aquiliae* to remedy judicial wrongdoing; and they consequently used the term *dolus* in a different sense. Meanwhile, it is submitted, with respect, that the court's interpretation wholly contradicts the historical sources in equating the (historical) meaning of *bedrog* or fraud with improper motive. This erroneous equation is evident from the decision in *Moeketsi* where it is stated:

*“Die gemeenregtelike posie word korrek weergegee in Penrice v Dickinson...en dit is duidelik dat in ons reg [is] ‘n regsprekende beampste wat in sy judisie hoedanigheid optree slegs vir sy kwaadwillige of bedrieglike optrede aanspreeklik.”*⁴⁹⁷

And further: *“Die gesag is duidelik dat daar mala fides, kwaadwilligheid of bedrieglike optrede aanwesig moet wees.”*⁴⁹⁸

Undoubtedly this approach is in accordance with the decision of the Appellate Division in *May v Udwin*, as well as with the other more recent decisions in this field and the prevailing opinion in

⁴⁹⁵ Compare the classic definition by Labeo at chapter II 2 3 1 2.

⁴⁹⁶ See above at chapter V 3 text at fn115-139.

⁴⁹⁷ *Moeketsi v Minister van Justisie* 1988 (4) SA 707 (T) 713 (G).

⁴⁹⁸ *Ibid.* at 714 (C).

the legal literature. It is the final brick in the concept of qualified immunity and thus admirably provides an harmonious and uniform theory of judicial liability.

However, the proposition of the court in *Moeketsi*, which followed the Appellate Division's judgements in *Matthews* and *Penrice*⁴⁹⁹, that, according to the Roman-Dutch authorities, improper motive was decisive for liability for wrong judgements is simply not in accordance with what the sources indicate.⁵⁰⁰ Improper motive, as we understand it today, has *never* been considered decisive in the determination of *dolus* as a state of mind. It may have played some role in the Middle Ages, as Kuttner indicates cautiously at one point in his work *Kanonistische Schuldlehre*.⁵⁰¹ Kuttner suggests that the Christian fault doctrine may have been responsible for this⁵⁰², but he too makes it clear that motive was only occasionally used to stress the '*gewollt-emotionale Moment*', the wilful and emotional element, the *voluntas* or *intentio fallendi* as the antithesis of the element of *scientia*, the consciousness of wrong.

Strictly speaking, the decisive characteristic of intention remained the blending of consciousness and will, which is indicated by the term *ex proposito*.⁵⁰³ Thus, it may be stated that *dolus* was never constituted by improper motive, and that the authorities never considered improper motive an alternative to *dolus*. Nor was *dolus* equated with improper motive even where use was made of *dolus* within the *actio de dolo*.

Authority for this conclusion may be found especially in the Roman-Dutch sources that relate directly to judicial liability for wrong judgements. The first authority the court quoted in *Moeketsi* was Groenewegen.⁵⁰⁴ Groenewegen indicates that the liability of a judge depended on whether or not the judge acted with *dolus* and *calliditas*. If we recall that Groenewegen is one of the Roman-Dutch jurists who advanced the view that judges should be liable under the *actio de dolo*, his use of a meaning of *dolus* extended by *calliditas* is sufficiently explained. There is no indication whatsoever that motive was considered decisive by Groenewegen to determine the

⁴⁹⁹ See above at 3 3 2 and 3 2 2 2, respectively.

⁵⁰⁰ In his work *Roman Private Law* Van Zyl J himself indicates at no point that motive has played such a role in Roman Law. More precisely, at page 346 where he discusses the liability of the *iudex, qui litem suam fecit*, reference is solely to partiality, negligence or ignorance as requirements of state of mind.

⁵⁰¹ At 41.

⁵⁰² *Ibid.* at 75.

⁵⁰³ *Ibid.* at 42. See also Joubert JA in *May v Udwin* 1981 (1) SA (1) 13 (H).

⁵⁰⁴ *Tractatus*, Inst.4.5.

liability of a judicial officer even under the *actio de dolo*, or that *calliditas* had anything to do with motive. *Calliditas* was simply used as the description of particularly reprehensible conduct.

Similarly, the other Roman-Dutch works the court referred to, namely Voet's *Commentarius* and Van Leeuwen's *Rooms-Hollands Regt*, do not indicate that malice or improper motive was relevant for the determination of judicial liability.⁵⁰⁵ Van der Keessel's *Theses Selectae* was not quoted *verbatim* by the court. In this work, as well as in his *Praelectiones Iuris Hodierni*, Van der Keessel makes the point that either *dolus* or *culpa lata* suffices for liability.⁵⁰⁶ Huber as we know included references to *dolus*⁵⁰⁷ and, in addition, to *culpa lata* in his *Eunomia Romana*,⁵⁰⁸ as well as to *opzet*, *boos opzet*, *quaet opzet* in his other works.⁵⁰⁹ Other Roman-Dutch writers not cited by the court, such as Vinnius⁵¹⁰, Christianaeus⁵¹¹, Tulden⁵¹² and Matthaeus⁵¹³, also refer to *dolus* without any reference to a criterion of motive. The *Nieuw Nederlands Advys-Boek* includes a case where a presiding judge "...met opzet, onbehoorlyk, en teegen alle Regten geconcludeert heeft."⁵¹⁴ Kersteman in his *Woorden-Boek* refers to *bedrog* and to *doleuselyk* conduct of a judge.⁵¹⁵

Taking into consideration other contemporary authorities of the *ius commune*, it appears that the Netherlands was not out of step in regard to the requirements for judicial liability. Heineccius⁵¹⁶

⁵⁰⁵ See at Voet, *Commentarius*, 5.1.58 and Van Leeuwen, *Rooms-Hollands Regt*, 4.33.10, respectively. See further Voet's *Compendium Iuris*, 4.5 and *Elementa Iuris*, 4.5. With regard to Van Leeuwen, the court held that no answer was to be gleaned from this author since in this text Van Leeuwen "...maak...nie melding van bedrieglike optrede van die regter...nie." This is not necessarily a correct interpretation of the passage in question. As has been indicated elsewhere (see above at chapter V 4 1 4) subsection 10 ought to be read *together* with the following passage where Van Leeuwen proceeds to analyse the liability of members of the legal profession. There he makes the point that *bedrog* was sufficient basis for liability. If we compare this passage with his statements in his other major work, it is evident why Van Leeuwen made use of the wider term *bedrog*.

⁵⁰⁶ *Theses Selectae*, Th. 808; *Praelectiones Iuris Hodierni*, 3.37.9.

⁵⁰⁷ *Praelectiones Iuris Civilis*, I.4.5.2.

⁵⁰⁸ *Eunomia Romania*, 415.1.

⁵⁰⁹ *Heedendaegse Rechtsgeleertheyt*, 2.3.3.3-6; *Beginzelen der Regtkunde*, 4.3.4.

⁵¹⁰ *Ad Institutionum*, 4.5.1.1 and 3.

⁵¹¹ *Decisiones Curiae Belgiae*, 1.6.2 and 4.95.1 and 4.

⁵¹² *Ad Institutionum*, 4.5.1.

⁵¹³ *De Auctionibus*, 1.19.86.

⁵¹⁴ Advys 46.IV at 507.

⁵¹⁵ *Hollandsch Rechtsgeleert Woorden-Boek* Amsterdam (1786) 'Rechters'.

⁵¹⁶ *Recitationes*, § 1113.

as well as Stryk⁵¹⁷, Hoppius⁵¹⁸, Schultzen⁵¹⁹ and Brunnemann⁵²⁰ advocate judicial liability for *dolus malus*. So does Lauterbach, who refers to the judge who gives a wrongful judgement *ex proposito* and *dolo malo*.⁵²¹ Leyser discusses the liability of the judge under the rubric *De Syndicatu* and refers his readers to, among others, the *dolo* acting judge or *syndicatus*.⁵²² Strube explicitly mentions the judge who intentionally gives an unjust judgement: “*Wenn der Richter vorsätzlich...ein ungerechtes Urtheil fällt, so wird er billig von dem in Anspruch genommen, der dadurch um das seinige gebracht worden ist.*”⁵²³ And Glück once more makes the point that *dolus* may not always be understood in the sense of fraud (*Betrug*) as is the case with contractual obligations. With regard to delicts, it is more appropriate to refer to intention (*Vorsatz*).⁵²⁴

The pandectists discuss the (general) relation between *dolus* and motive more exhaustively and Sintenis devotes eight pages to an elaborate and comprehensive discussion of the liability of the judge.⁵²⁵ Nowhere is motive referred to as a means of determining judicial liability. On the contrary, Windscheid and Regelsberger make it abundantly clear that motive is wholly immaterial for the determination of *dolus*.⁵²⁶

Despite the argument that we are not tied to the past, the reliance of the courts in recent years on the historical sources for the determination of the modern law of judicial liability for wrong judgements makes it difficult to see how this liability can be based on an historically incorrect foundation. The underlying explanation for the negative decision in *Moeketsi* and in all preceding decisions is not easy to establish. That there was unconsidered quoting of previous decisions or uncritical or unreflective analysis of the old authorities is improbable, considering the knowledge and learning of the judges involved. What appears more reasonable is that the courts tried to reconcile the historical facts with the demands of their day. Earlier in this century,

⁵¹⁷ *Iustiniani Institutionum*, 4.5.

⁵¹⁸ *Commentatio*, 4.5 at 803. It is noteworthy that he quotes following Roman-Dutch authorities: Groenewegen, Van Leeuwen, Christianaeus and Vinnius at 805 *usus hodiernus*.

⁵¹⁹ *Synopsis Institutionum Imperialium*, 4.5.1

⁵²⁰ *Commentarius*, 50.13.3.

⁵²¹ *Collegium Theoretico-Practicum*, 50.13.§ 2.

⁵²² *Meditationes ad Pandectas*, Spec. 680.2 and 4. It is interesting that he quotes extensively from Groenewegen and appears to approve the latter's ‘ability argument’.

⁵²³ *Rechtliche Bedenken*, 646.

⁵²⁴ *Pandecten*, 2.14.§ 293-295.1.a.

⁵²⁵ *Civilrecht*, vol.II § 125.3.

⁵²⁶ *Pandektenrecht*, § 101.2 fn6; Regelsberger, *Pandekten*, §§ 143.2 and 179.1.

it was probably the overwhelmingly strong influence of the concept of malice on the law of delict that influenced the reading of the old authorities.

It should not be ignored that from the early days of *Bosman*, 116 years ago, South African courts were determined not to follow the English courts and to grant judicial officers absolute immunity. It was the influence of Roman-Dutch law that prevented full-scale adoption of English principles in this field. But even though, theoretically, absolute immunity did not hold sway, the courts showed no reluctance in interpreting the Roman-Dutch sources in such a way as to force them into the mould of qualified privilege. Qualified privilege, in turn, was determined by malice. Thus, once more, it was the unfortunate role of malice that made the courts look in the historical sources for absence of good faith in a judge's conduct, which was then seen as indicative of the desired criterion of malice.

Relying rather superficially on only four statements by the old authorities, the courts in the earlier decisions failed to realise that *dolus*, even in the meaning of fraud or deceit, never implied improper motive in Roman-Dutch law. Wherever the earlier judges could grasp the smallest glimpse, idea or imprint of a good faith criterion in the Roman-Dutch sources, they took it as an indication of malice. A more detailed analysis would have clarified for them what the Roman-Dutch jurists really had in mind when they referred to *dolus* or *dolus malus*.

In *Moeketsi*, a totally different distinction might have prevailed. Perhaps it was the intention of the court to reconcile the law in cases of wrongful imprisonment with the law in relation to judicial defamation as stated by the Appellate Division in *May v Udwin* some seven years earlier. There, once and for all, malice was made the decisive criterion on which to base judicial liability for defamation under the *actio iniuriarum*. What the court in *Moeketsi* neglected to take notice of, however, was that in Roman-Dutch law the liability of judges for defamation was not settled in the same way as liability for wrong judgements. The preconditions were totally different. The lack of clear statements by the jurists with regard to judicial defamation is mirrored by the wealth of sources that deal with liability for wrong judgements. Whereas there is undoubtedly some indication of improper motive in the former, the authorities consulted make abundantly clear that improper motive never served as a determinant with regard to instances of wrong judgements.

3 5 2 3 *Alternatives to the motive requirement*

Taking into account the above arguments against the motive requirement, it appears that there is at least some reason for holding that improper motive and the doctrine of abuse of right should not be required for the determination of judicial liability for wrongful misjudgements and wrongful imprisonment. But is there an acceptable alternative to the motive requirement?

(a) *Negligence*

On the basis of the Constitution, negligence could certainly be considered one alternative. In light of ss 2 and 165 (2) of the Constitution, judges are under a legal duty to act carefully and in accordance with the law. This could be interpreted as a strong indicator of wrongfulness or even more so the unconstitutionality of a negligent judgement.

There is little doubt that a negligence-based requirement would give rise to a number of difficult albeit very interesting questions. To mention just a few: Firstly, although we can easily establish the legal duties a judge owes to the parties before him (ss 2 and 165 (2) of the Constitution), it is not easy to establish precisely the necessary objective standards of the reasonable judge, the *bonus iudex* so to speak: A judge would be liable if the reasonable judge in his position would have acted differently.⁵²⁷ What then are the relevant standards of professional (judicial) competence? Certainly, the standards applicable to magistrates must differ from those applicable to judges of the various provincial divisions. With respect to the latter, however, one may – provocatively – question whether the judges of the High Court should be subject to the same standards as the judges at the Supreme Court of Appeal or the Constitutional Court. From what has been said earlier, it is also obvious that the reasonable judge test may not be confused with the test of wrong judgement. Although the standards applied to the test of wrong judgement are objective ones, this test does not relate to what the *bonus iudex* would or would not have done. It entails more the question of whether or not the judicial decision was a proper one, found on the basis of the law.⁵²⁸

Secondly, policy considerations come into play. Aspects of policy make it necessary to weigh the arguments in favour of judicial accountability against those in favour of the protection of judicial independence and judicial dignity. The singularity of the concept of judicial liability

⁵²⁷ Neethling *et al*, *Law of Delict*, 122 and 129 (with respect to experts, i.e., dentists, surgeons, electricians. At least in theory judges could be included here).

⁵²⁸ See again above at 3 5 2 1 and Neethling *et al*, *Law of Delict*, 143.

makes it difficult to draw distinctions. Overall, the scale tips in favour of the protection of judicial independence. Although by denying liability for negligent misconduct there will remain a number of cases where an objectively wrong judgement will not lead to liability, this is the price society has to pay for an independent judiciary which has been identified as an equally important feature of the constitutional state.

(b) *Dolus*

Dolus might also be considered an acceptable alternative. Determining wrongfulness by *dolus* is, overall, less ‘costly’ than accepting improper motive as the decisive requirement.⁵²⁹ The arguments in favour of the application of *dolus* are based primarily on practical and historical considerations. The historical facts have been elaborated in great detail and need no further comment. From a practical point of view, *dolus* is easier for a plaintiff to prove than improper motive. This is particularly the case if extrinsic evidence on the state of mind of the judicial officer is permissible.

It is questionable, however, what form of *dolus* should find preference. On the one hand, *dolus eventualis* could be considered the relevant state of mind. Accordingly, a judge would be liable even if he did not intend to give an incorrect judgement, but foresaw that his judgement might be incorrect and recklessly gave it anyway. On the other hand, one might insist on *dolus directus*. This would require that the judge actually desired a particular consequence of his conduct.⁵³⁰ As a matter of principle, *dolus directus* should be included in cases of judicial liability. It might be going too far, however, to hold a judge liable for *dolus eventualis*, since judges, faced in many cases with ambiguous sources, must ultimately make their decisions, even though they can foresee the possibility of their being overruled by a higher court. One might add to this the problems so-called activist judges would face.⁵³¹ Liability for *dolus eventualis* must also be

⁵²⁹ Olowofoyeku, in his excellent work *Suing Judges*, 204 advances the view that in general the privilege judges enjoy in common law systems, particularly in England, ought to be qualified, not absolute. In his eyes a malice-based liability should apply in order to prevent vexatious and harassing actions against judges; in other words to protect judicial independence. What at first sight appears to underpin the position South African courts and academics have advanced for the past decades, is precisely in line with the approach favoured in this thesis. Olowofoyeku defines malice (as he uses it) “...as including a conscious purpose or intent to injure unlawfully.” There is no doubt that Olowofoyeku’s definition is identical with *dolus* as defined here earlier: a person acts with *dolus* where his will is directed at a result which he causes while conscious of the wrongfulness of his conduct. See *inter alia* Neethling *et al*, *Law of Delict*, 116; Boberg, *Delict*, 268; Van der Merwe and Olivier, *Onregmatige Daad*, 115; Wille’s *Principles of Law*, 652.

⁵³⁰ Neethling *et al*, *Law of Delict*, 117; Boberg, *Delict*, 37.

⁵³¹ The related problems have been indicated by Labuschagne, 1993 *De Jure*, 358-359. The problem is also apparent where questions of interpretation of statute law arise as well as aspects of precedent. Here briefly reference must be made to the

considered detrimental since it would prevent judicial creativity of the kind displayed for instance by Lord Denning in the well-known case of *Candler v Crane, Christmas & Co.*⁵³²

In this case, Lord Denning LJ attempted to extend the law even though he knew that he was 'twisting' precedent to reach the conclusion that a negligent misstatement causing economic loss might be actionable in the tort of negligence. Even though academic opinion favoured an extension, the law blocked the way by binding precedent. Lord Denning LJ, contrary to his brethren on the Bench, creatively manipulated precedent to achieve the result he wanted. In a sense his judgement was wrong since the majority disagreed and there was no appeal (regardless of the fact that in 1964 in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* the House of Lords overruled the majority opinion in *Candler* and followed Lord Denning's LJ approach).⁵³³ It is arguable, however, whether or not Lord Denning LJ deliberately broke the law in *Candler* and thus gave a wrongful judgement (in the sense of the definition given above). Certainly, it would be a lot easier to ascertain that Lord Denning LJ had acted with *dolus eventualis* than to prove that he was actuated by *dolus directus*. From this it follows that liability for *dolus eventualis* would inhibit judicial creativity, one of the most fundamental assets of any common law system, including the (mixed) South African legal system.

Finally, the difficulties noted by some academics with regard to *dolus* as a test for wrongfulness⁵³⁴ must be mentioned here. It is thought that using *dolus* as a test for wrongfulness leads to a confusion between wrongfulness and fault. However, as the law stands, it is now widely accepted that fault including *dolus* can be used as a determinant of wrongfulness.⁵³⁵

That the application of *dolus directus* would provide for a considerably wider scope of judicial liability is evident from the following: A judge who sentences a young criminal, who has never been sentenced before and who is known to be a drug addict, to five years of imprisonment for shoplifting, undoubtedly imposes a sentence which is *contra legem* according to South African law. The judge wishes the young offender to participate in a highly successful method of treatment for addiction, which takes about five years. This laudable motive is the only motive for

so-called moderate or radical theories of interpretation which advocate, albeit to a varying degree, the creative role played by the judiciary in the interpretation of statutes. This enormously wide field cannot be dealt with here. See for more detail Du Plessis, *Interpretation*, 271-273.

⁵³² [1951] 2 KB 164 (CA). For details see Boberg, *Delict*, 60, 67, 86 and 88.

⁵³³ [1964] AC 465 (HL). See Boberg, *Delict*, 83 for a discussion.

⁵³⁴ Neethling *et al*, *Law of Delict*, 37.

⁵³⁵ Boberg, *Delict*, 37 and also Neethling *et al*, *Law of Delict*, 38.

the judge's misapplication of the law. Of course, the judgement could be challenged on various grounds, but apart from any other consideration, it is clear that the judge deliberately acted *contra legem*. Under the present position of the law, however, the judge could not be held liable for his misjudgement since he was not actuated by improper motive.

It is not necessary to create a fictitious example such as the above to demonstrate the striking disadvantages of the motive requirement. In *Credex Finance (Pty) Ltd v Kuhn*, a magistrate refused to follow the doctrine of judicial precedent by denying an award of costs to a party.⁵³⁶ In an intentional misapplication of the doctrine of *stare decisis*, he simply decided that the binding precedents were wrong. In consequence, the plaintiff was obliged to appeal in order to receive a correct judgement. Didcott J, as he was then, found it: "...difficult to believe that the magistrate did not understand this [the binding force of the doctrine of *stare decisis*]...". The learned Judge came to the conclusion that the magistrate "...defied the Supreme Court in *deliberate* disregard of the doctrine of judicial precedent."⁵³⁷ And that:

"The plaintiff has not asked for the defendant to be directed to pay the costs of the appeal. This was a proper attitude. The defendant had nothing to do with the mishandling of the case which has resulted in the appeal. The plaintiff must therefore bear the expenses to which it has unnecessarily been put. The waste of money was caused solely by the magistrate. He can count himself fortunate that the plaintiff did not seek an order against him personally for the costs of the appeal."

Again we are faced with an example where a *deliberate* misapplication of the law by a judicial officer infringed the legal rights of an individual. In this case, the costs of the appeal were undoubtedly an economic loss to the plaintiff. Although Didcott J went as far as to state obiter that the magistrate's behaviour in the case might possibly amount to *mala fides*, it was not possible in the existing state of the law to hold the magistrate liable for the deliberate breach of the law that occurred, without proof of such improper motive.⁵³⁸ Or in other words: there occurred only a technically wrong judgement, but not an actionable wrongful misjudgement. And to make things worse, it also appears from this judgement that *Credex* was not an exception. The magistrate in question had followed the same course in a substantial number of previous cases.⁵³⁹

Both the above instances indicate that it would be easier to prove *dolus* of a judicial officer, which would inevitably lead to an – albeit acceptable – increase of judicial accountability.

⁵³⁶ (3) SA 1977 482 (A).

⁵³⁷ *Ibid.* at 485 (B). My italics.

⁵³⁸ *Ibid.* at 485 (H).

⁵³⁹ *Ibid.* at 483 (F).

3 5 3 The essential requirements of the element of fault

By making the issue of wrongfulness depend on a particular form of fault, the law leaves little room for discussion of fault as a separate requirement. In every case where wrongfulness has been established, fault will be present. Suffice it to say that a judicial officer may raise any of the accepted defences, most likely that of mistake (error) with regard to fact or the law, that exclude *dolus* and, hence, wrongfulness. If the judge can show that he was mistaken as to law or fact, as opposed to deliberately misapplying it, he will have shown he did not act *dolo*.

As regards the question of the reasonable judge, which was raised earlier in the context of determining the wrongfulness issue, this aspect clearly belongs to the fault requirement. However, since a judge will not be liable if he acted negligently, there is no need to go into this question.

4 PROCEDURAL ASPECTS OF JUDICIAL LIABILITY

4 1 The concept of leave to sue in modern South African law

In addition to judicial immunity in substantive law at present, South African superior court judges also enjoy some procedural protection.⁵⁴⁰ According to s 25 (1) of the Supreme Court Act No 59 of 1959 and s 5 of the Constitutional Court Complementary Act No 13 of 1995, no process may be issued against a superior court judge except with the so-called consent of court. This procedural immunity applies in two instances, namely, where a summons or a *subpoena* is issued against a judge. No distinction is drawn here between the personal or judicial capacity of the judge.⁵⁴¹ Generally, the concept is referred to as leave to sue. Judges of inferior courts, such as magistrates or members of quasi-judicial bodies do not enjoy this kind of procedural privilege.

⁵⁴⁰ Boule *et al*, *Constitutional and Administrative Law*, 203 rightly observe that the concept of leave to sue: "...affords judges a different kind of immunity."

⁵⁴¹ Erasmus, *Superior Court Practice*, Service 3, 1995, A1-75.

The South African concept of leave to sue is almost unique. Except for Botswana and Namibia, no other country provides at present for a similar preliminary procedural requirement.⁵⁴² It is evident that leave to sue was received by these bordering countries as part of the general assimilation of South African Roman-Dutch law.

Until recently, leave to sue was hardly ever subject to criticism in South Africa. It was generally considered an additional means towards protecting the South African judiciary from vexatious, unmeritorious and frivolous actions that could undermine its reputation, integrity and dignity.⁵⁴³ Such ill-conceived actions, it was argued, are mostly the result of a litigating party's frustration at losing a case. Thus it was held that "...it is not desirable that officials in those positions should be brought into court unless it is absolutely necessary."⁵⁴⁴ The reference to the reputation of the judiciary is evidence that it is – once again – mainly public policy considerations that explain the judiciary's extended procedural protection.

However, a critical observer will have some difficulty with the concept of leave to sue. The first problem is that it is the judiciary itself that decides whether or not to grant leave to sue. Secondly, the concept of leave to sue does not appear to correspond with s 34 of the Constitution of 1996, which provides for unrestricted access to the courts. Thirdly, it may be asked whether leave to sue is necessary, considering the far-reaching immunity judges already enjoy under the substantive law.

Before concentrating on the feasibility and constitutionality of the concept of leave to sue in modern South African law, an overview of the historical development is needed. While a handful of authors have commented, briefly, on the contemporary situation, no one has ever tried to trace the historical roots of this requirement.⁵⁴⁵ This is a pity since the concept of leave to sue is a remarkable instance of the formation of South Africa's mixed legal system.

⁵⁴² So far as assessed. See s 12 Supreme Court Act of 1990 (Namibia); Order 4 rule 14 (Botswana). In Italy repealed procedural rules required the consent of the Minister of Justice before an action for damages could be filed. See Olowofoyeku, *Suing Judges*, 211.

⁵⁴³ *Ngobe v O'Brien-Quinn* Botswanian High Court cases 123/85 and 1/86, unreported. Quoted from Othlhogile, *LLJ* 7 (1991), 110; Erasmus, *Superior Court Practice*, Service 3, 1995, A1-76; Harms, *Civil Procedure*, 63; Boule *et al*, *Constitutional and Administrative Law*, 203-204; Nathan and Barnett, *Rules of Court*, 618; Herbstein and Van Winsen, *Civil Practice*, 426; Herbstein and Diemont, *Superior Court Practice*, 43.

⁵⁴⁴ *Ex parte Aaron* 1904 TS 487 at 489 per Rose Innes CJ.

⁵⁴⁵ Riekert's contribution in *THR-HR* 41 (1978), 426-431 deals predominantly with the question whether leave to sue was required as a prerequisite to sue the State President.

4 2 Historical roots of the concept of leave to sue

It is contended that the modern South African law of procedure is predominantly of English origin: According to Ellison Kahn, civil procedure in South Africa “...owes its origins to and is essentially that of England.”⁵⁴⁶ As described earlier, the first Charter of Justice brought sweeping changes to the administration of justice at the Cape and, in due course, to the whole of what is today South Africa. However, Ellison Kahn’s statement has to be modified in that South African procedural law, albeit strongly influenced by English rules and concepts, retained and developed its own peculiarities.

Four instances serve to illustrate this. First, as said above, no system of common law and equity courts was established at the Cape.⁵⁴⁷ This century-old dichotomy of jurisdiction in English law did not offer a sound alternative for the Cape legal system when it was decided, for political reasons, to retain Roman-Dutch law as the law of the colony.⁵⁴⁸ Then, unlike the situation in England at the beginning of the nineteenth century, the Cape Colony never adopted the classifications of forms of actions, also known as writs. These writs were hopelessly entangled with questions of substantive English law and there was clearly no point in accepting this system of pleading at the Cape. In consequence South African pleading was to a large extent “...spared the excessive technicality of common-law pleading...”⁵⁴⁹ Again, unlike their brethren in England, judges at the Cape were vested with far-reaching power to make rules.⁵⁵⁰ With this power, they had an effective and flexible tool to shape procedural law in accordance with local priorities and peculiarities. We will see later that this rule-making power had some importance in the emergence of the concept of leave to sue in South African procedural law. Finally, a number of procedural features accepted in modern South African procedural law can be identified as of Roman-Dutch origin. Reference may be made to the concepts of provisional sentence (*provisie van namptissement*), spoliation order (*mandament van spolie*), security on

⁵⁴⁶ Kahn, *SALJ* 106 (1989), 613.

⁵⁴⁷ See above at 1 1 1. Erasmus, *Interaction*, 146 and *SALJ* 108 (1991) I, 267 *et seq*; Art I First Charter of Justice. See also Hosten *et al*, *Introduction*, 352; Hahlo and Kahn, *Legal System*, 575; Zimmermann, *Römisch-holländisches Recht in Südafrika*, 11.

⁵⁴⁸ Article 31 First Charter of Justice. See Theal, *Records of the Cape Colony*, vol.XXXII 255 *et seq* and Van der Merwe, *Regsinstellings en Reg aan die Kaap*, 266-268 and 276-281.

⁵⁴⁹ Nevertheless this may not be understood in the sense that no interaction between procedural and substantive law took place. See Erasmus, *Interaction*, 151-161 for a discussion of these. Further by Erasmus, *Stellenbosch LR* 1 (1990), 348 *et seqq*.

⁵⁵⁰ Article 46 First Charter of Justice. See Erasmus, *SALJ* 108 (1991) II, 476-484. See also below at 4 2 1.

oath (*cautio iuratoria*) and ascertainment of facts to complement pre-trial litigation (*interrogatio in iure*).⁵⁵¹

Like these instances, the concept of leave to sue did not derive from common law principles. However, as we shall see presently, its roots did not lie in Roman-Dutch procedural law either. In fact, leave to sue appears to have been a Batavian-Cape-Dutch concept which, amazingly, found its way into modern South African law.⁵⁵²

English common law did not recognise leave to sue as a preliminary or supplementary procedure required to sue a judge. Because of the strong protection conferred upon English judges by virtue of the substantive law, it was never necessary to provide for this additional procedural safeguard. A recent critical reassessment of the scope of absolute protection of judges in England has considered South Africa's unique concept of leave to sue a reasonable alternative to the present position in English law.⁵⁵³

From earlier discussion of this subject, it may be remembered that in the Low Countries the relevant Roman law had been abrogated. In Roman law, superior magistrates (but not the classical *iudex*) could not to be sued while in office.⁵⁵⁴ There remains some uncertainty as to the state of law in post-classical Roman law. In practice, it was probably rare for a judge to be sued. By way of contrast, however, Roman-Dutch magistrates of all kinds, including all ranks of judges, could be sued legally like private individuals.⁵⁵⁵ Thus, Roman-Dutch law, like English law, did not contain a concept resembling leave to sue.

⁵⁵¹ Generally see Taitz, *SALJ* 96 (1979), 476; Erasmus, *Interaction*, 149. On the *provisie van namptissement* see Dolezalek, *Zivilprozessrecht*, 95-96; Hosten *et al*, *Introduction*, 354; Malan and De Beer, *Provisional Sentence*, 229-231. On the *mandament van spolie* see Dolezalek, *Zivilprozessrecht*, 97-99; Kleyn, *Mandament van Spolie*; with regard to the historic development in South Africa see by the same author *Possession*, 835-846, on the earlier development in the Low Countries see Kleyn, *Possession in Roman-Dutch Law*, 557-565. On the *cautio iuratoria* see *Magida v Minister of Police* 1987 (1) SA 1 (A) 6-15 *per* Joubert JA. On the *interrogatio in iure* see Faris, *Consideration*, 22-68.

⁵⁵² See below at 4 2 1.

⁵⁵³ Olowofoyeku, *Suing Judges*, 206-212.

⁵⁵⁴ *D* 2.4.2.

⁵⁵⁵ See above chapter V 7.

4 2 1 The introduction of the doctrine of leave to sue into South African law

From the earliest days, South African law has recognised the procedural privilege of judges. The Supreme Court Act of 1959, as well as the Uniform Rules of Court Act of 1965, have been identified as milestones in unifying distinct procedural rules set up by the various courts that formed the new Supreme Court of South Africa in 1910. The Uniform Rules of the Supreme Court expressly repealed all previous rules of court made by legislation prior to the Supreme Court Act of 1959.⁵⁵⁶ Consequently, s 25 of the Supreme Court Act of 1959 and, more recently, s 5 Constitutional Court Complementary Act of 1995 became the successors of the various rules with regard to leave to sue of the provincial divisions of the Supreme Court and their pre-Union predecessors.⁵⁵⁷

The requirement of obtaining leave to sue was *inter alia* included in rule 15 (1) of the Cape Rules of Court, rule 12 of the Transvaal and 19 of the Orange Free State Rules of Court, as well as in rule 1 of the Natal Order XI.⁵⁵⁸ The rules of these three provincial divisions were framed in accordance with former rule 9 of the Rules of the Supreme Court of the Colony of the Cape of Good Hope⁵⁵⁹, which was promulgated in open court on 1 January 1828 as valid law in the Cape Colony.⁵⁶⁰ Minor changes of the wording of rule 9 were introduced and promulgated in 1834 and 1841 without essentially changing the legal consequences of the original rule. The promulgation of the earliest Rules of Court, which were drafted by one of the puisne judges of the newly created Supreme Court, William Westbrooke Burton (1784-1888)⁵⁶¹, was preceded by

⁵⁵⁶ Save for the rules referred to in the schedule to rule 71.

⁵⁵⁷ For reasons that are not clear, the Supreme Court Act of 1959 as originally promulgated, omitted protection of the judiciary similar to that provided in the provincial rules, but in terms of s 46 (1) Supreme Court Act, any provincial rules of court remained in force until repealed. In 1963, s 4 of the Supreme Court Amendment Act No 85 introduced today's regulation, which was amended by s 3 Supreme Court Amendment Act No 41 of 1970 according to which magistrates were not permitted to grant leave to sue against a superior judge.

⁵⁵⁸ With regard to the Natal rule see again *Tilonko v The Governor* (1908) NLR 70.

⁵⁵⁹ The establishment of the Natal District Court resulted in the introduction of rule 10 promulgated in Ordinance No 32 of 1846, the predecessor of order XI rule 1. See also Rieckert, *THR-HR* 41 (1978), 427.

⁵⁶⁰ The first collection of rules of court of the Cape Supreme Court was published by R J van de Sandt titled *Rules, Orders, &c., Touching the Forms and Manner of Proceeding in Civil and Criminal Cases, Before the Supreme, Circuit, & Magistrates' Courts in the Colony of the Good Hope Cape Town* (1835). Later editions appeared in 1843 and 1864. Under the title *Rules, Orders, &c., touching the Forms and Manner of Proceeding in Civil and Criminal Cases, before the Superior and Inferior Courts of the Colony of the Cape of Good Hope Cape Town* (1886) the work was continued by H Tennant.

⁵⁶¹ Erasmus, *Interaction*, 147. With regard to W W Burton see Girvin, *Architects*, 98-99 as well as *Influence* at 222-223; Fine, *Cape Supreme Court*, 454; Kahn *SALJ* 98 (1981), 557 *et seqq.*

the issue of the First Charter of Justice under letter patents on 24 August 1827. Rule 9 of the Cape Rules of Court stated the following:

“All Civil Process of this Court may be sued out by any one having matter of Complaint or Demand against another unsatisfied...against any person whatsoever, without any leave for that purpose obtained; excepting only the Governor, or Lieutenant-Governor, or other officers administering the Government of this Colony for the time being and *His Majesty's judges of the Supreme Court...*”⁵⁶²

As has been said, the First Charter of Justice vested judges with far-reaching powers to “...frame, constitute and establish such rules, orders and regulations as to them shall seem meet...touching the forms and manner of proceedings to be observed....”⁵⁶³

It has been argued that the initial Cape rule was rooted in the English constitutional doctrine of crown immunity, which found expression in the maxim ‘The king can do no wrong’.⁵⁶⁴ Accordingly, the monarch could not be impeached in his own courts. This maxim was the foundation of restricted crown or state liability in English law, which was removed by legislation only after the 1880s.⁵⁶⁵ It has been suggested that this tendency to limit the liability of the crown led to the introduction and preservation of the concept of leave to sue in South African law in relation to the colonial governor and, in turn, to colonial judges.⁵⁶⁶

This argument on the origins of the rule cannot be supported. Firstly, it is doubtful whether the doctrine of crown immunity provides enough ground for assuming that the concept of leave to sue, particularly with respect to the judiciary, derived from this source. English law has never identified judges as government or crown officials. Secondly, this interpretation fails to question whether other, non-English, influences could have had some impact on the emergence of the concept of leave to sue in South African law.

There is, in fact, strong evidence that leave to sue was not introduced by the British into South African law. A link with the state of law prior to the first Rules of Court can be found in the evidence of then Chief Justice Sir John Truter given on 30 August 1825 to the 1823-Commission of Inquiry led by J T Bigge and Major W M G Colebrooke.⁵⁶⁷ Truter CJ’s evidence

⁵⁶² Van de Sandt, *Rules*, 3. My italics.

⁵⁶³ Article 46 First Charter of Justice. See Erasmus, *SALJ* 108 (1991) II, 476 *et seqq.*

⁵⁶⁴ Riekert, *THR-HR* 41 (1978), 427.

⁵⁶⁵ Cilliers and D’Oliveira, *State Liability*, 219-224; Van der Westhuizen, *Länderbericht Südafrika*, 615-617. See also Riekert, *THR-HR* 41 (1978), 428 fn16 with reference to the Crown Liabilities Act of 1888 (Cape), Crown Suits Act of 1894 (Natal), Crown Liabilities Ordinances of 1903 for the Transvaal and the Orange River Colony.

⁵⁶⁶ Riekert, *THR-HR* 41 (1978), 428.

⁵⁶⁷ See above at 111.

shows neatly to what extent the commission inquired into various aspects of the administration of justice. Of particular interest is his evidence with regard to the law applied in the Colony, to questions of the hierarchy of the courts, their staffing and the training of the judges.⁵⁶⁸ Moreover, his statements indicate that English speaking Supreme Court judges were probably not the first judges in South Africa to be vested with a rule-making power, and that their Dutch predecessors already enjoyed this privilege.⁵⁶⁹

The career of Truter CJ (who died in 1845⁵⁷⁰) is itself a colourful example of how some of the Dutch colonists adapted to the new government after the English took permanent possession of the Cape for the second time in 1806.⁵⁷¹ Owing to his personal background, his legal training and judicial career, Sir John served in the late 1820s as a link between the previous and the new regime. His statements are a remarkable historical source on the state of justice at the Cape early in the nineteenth century. To the Commission's question as to whether certain individuals were protected from civil actions unless a so-called *venia agendi*⁵⁷² had been obtained, Sir John responded:

⁵⁶⁸ The evidence is included in Theal, *Records of the Cape Colony*, vol. XXXIII 261 *et seqq.*

⁵⁶⁹ Question: "Do you conceive that the Court of Justice, as at present [1825] constituted, possesses any legislative functions?" Answer Truter CJ: "None whatever. It possesses however the power of framing rules for its own practice." *Ibid.* at 263. This notion could serve as an interesting supplement to the research Professor H J Erasmus has done with regard to the history of the rule-making power of the Supreme Court in South Africa. Erasmus argues that courts in civil law countries do *not* have a rule-making power. It is a peculiarity of common law systems. However, it is submitted here, with all due respect, that there might be a source other than exclusively common law influences for the implementation of the courts' rule-making power in the famous s 46 of the First Charter of Justice of 1827, i.e., Cape Dutch and thus a civil law influence. See for Erasmus's view *SALJ* 108 (1991) II, 476 *et seqq.*

⁵⁷⁰ It might be of interest to know when passing by that Sir John Truter's epitaph is visible at the right front side of the Groote Kerk in Cape Town's Adderley Street.

⁵⁷¹ Sir John was born Johannes Andreas Trüter on 11 October 1763 at Cape Town. He was a third generation colonist. His father was a city councillor and served as burgher member on the *Raad van Justisie*. Truter studied at Leiden University from 1783 to 1787, when he graduated *doctor iuris*. He returned to the Cape in 1789 as a servant of the VOC and worked his way up the ranks. In 1789 he became Second Assistant to the *Fiscal* and in 1793, Secretary of the Court of Justice. During the Batavian interlude, he was appointed Secretary to the Government and was a close aide to the then Governor General J W Janssens. Janssens who on his return to Europe, after the Cape was annexed by the English forces, recommended Truter to the new rulers. In 1809, Truter was appointed *Fiscal* and, in 1812, Chief Justice, a post he held until the old Court of Justice ceased to exist in 1828. Again, Truter appears to have pleased the *classe politique*, namely Sir John Cradock and Lord Charles Somerset, the two governors of the Colony under whom he served. He was the first 'South African' ever to be knighted (in 1820). Undoubtedly, a remarkable career for a Dutch colonist. Truter died in 1845. For biographical details see Botha, *SALJ* 18 (1901), 135-145; Van Warmelo, 1978 *De Rebus*, 361-363 and Roberts, *Bibliography*, 379.

⁵⁷² Translation: to obtain permission to act; in our context, permission to sue. For the historical roots of this term see below text at fn593.

“By the Statutes of India this protection is accorded to the high officers of the Government, the members of the Court of Justice...in practice it has been extended here to the Landdrost and Heemraden of Districts.”⁵⁷³

From his further comments it is clear that this application for *venia agendi* had to be made to the Court of Justice. The application was referred to a commissioner, who, in Truter’s words, “...reports upon the nature of the action and also tries to adjust it...”.⁵⁷⁴ The application, comprising the reasons which had given rise to the matter, had to bear an embossed revenue stamp and was formulated in terms of the deepest respect.⁵⁷⁵ *Venia agendi* was required in actions against officials and judges whether in their official or their individual capacity. The privilege extended indefinitely after the expiration of the term of office.⁵⁷⁶

However, some uncertainties remain. Firstly, it is not clear whether the commissioner was a judge to whom this task had been delegated or an inferior judicial officer. Secondly, it is uncertain whether *venia agendi* was granted as a matter of right or whether it was discretionary. Truter merely ‘believed’ that it was a matter of right.⁵⁷⁷ It is also unclear what he meant by adjusting the action.⁵⁷⁸ Was the commissioner supposed to mediate between the parties or was he merely empowered to decide on the correct grounds on which the party could sue?

Be that as it may, Truter’s comments clearly provide a link between the incorporation of this procedural privilege into the Cape Rules of Court and the earlier state of law. That William Burton and his fellows could have developed a new concept of leave to sue in 1827 is too much of a coincidence to accept. Undoubtedly, Burton consulted the mass of information provided by

⁵⁷³ Theal, *Records of the Cape Colony*, vol.XXXIII 268.

⁵⁷⁴ *Ibid.* at 269.

⁵⁷⁵ Botha, *Brief Guide*, 40.

⁵⁷⁶ Theal, *Records of the Cape Colony*, vol.XXXIII 269. The spectacular case of tragic Estienne Barbier (1699-1739) provides a rare example of *venia agendi* being sought against colonial officials during the Dutch rule. Barbier was a frenchborn sergeant in the VOC’s troops at Cape Town, who ended up sentenced to death and quartered on charges of treason. The court records of his final trial have been preserved in the National Archives. They show that Barbier, before escaping from prison and becoming a leader of a gang of rebellious settlers in the Hinterland, without success tried to lay a charge on grounds of denial of justice against the secretary of the Court of Justice at Cape Town at that time, P J Slootsboo. Barbier’s disillusionment on realising that it was the secretary’s own Court of Justice that had to grant *venia agendi* is obvious: “*De gemelde Slosboom...seid tegen mij, dat ik bij de gesaghhebber moest gaan om en permissie van hem te kreegen, en dat hy niet en kun sulx requeste schreeven, sonder de gesaghhebber zijn permissie.*” C.J. No 344, 214, 216-217. I am indebted to Dr Nigel Penn of the History Department of the University of Cape Town for knowledge of Barbier’s case. For further details see his article in *Social Dynamics*, 14 (1988), 1. Barbier’s thorny road to the scaffold inspired André Brink’s novel entitled *Inneendel* Cape Town (1993), also available in English under the title *On the Contrary* Cape Town (1995).

⁵⁷⁷ Theal, *Records of the Cape Colony*, vol.XXXIII 269.

⁵⁷⁸ *Ibid.*

the 1823 Commission, including Truter's evidence which was only two years old at that stage. Furthermore, considering the size of the legal community at the Cape in those days, it is beyond doubt that Burton and the other judges met Truter during the process of establishing the new Supreme Court at Cape Town. Finally, it may be assumed that Burton, in particular, was willing to consider Dutch legal concepts without prejudice. We know today that after his appointment to the Cape Bench early in 1827, he spent several months in the Netherlands, learning Dutch and making himself acquainted with Roman-Dutch law.⁵⁷⁹

4 2 2 A Batavian-Cape-Dutch legal concept?

Sir John Truter stated that the Statutes of India accorded, *inter alia*, procedural protection from civil actions to the judiciary. At an earlier stage of his evidence, he commented on the introduction of the so-called Batavian Statutes under Dutch rule at the Cape.⁵⁸⁰ These Batavian Statutes are identical to the above-mentioned Statutes of India.⁵⁸¹ From what we know today, Truter's comments are in accordance with the historical facts.⁵⁸²

The Statutes of India were drafted in 1640 by an advocate from Amsterdam, Jan Matsuycker, who joined the VOC in 1636 and was assigned to Batavia. Matsuycker held a doctorate from the University of Leuven (Southern Netherlands, today Belgium) and became an influential company servant. He served first as judge and later as president of the Batavian *Raad van Justisie*. In 1653, he became Governor-General at Batavia.⁵⁸³ The Statutes were a collection of various local Batavian *placaaten* which had been enacted since the early days of the Dutch settlement in Indonesia.⁵⁸⁴ They further comprised some regulations issued by the *heeren seventien*, as well as other general relevant *placaaten* of Dutch common law.⁵⁸⁵ In addition,

⁵⁷⁹ See Fine, *Cape Supreme Court*, 454.

⁵⁸⁰ Theal, *Records of the Cape Colony*, vol.XXXIII 265 *et seq.*

⁵⁸¹ Reference is thus either to the *Ou Statute van Batavia* or the *Statute van Indie* or to *Van Diemen se Kode*. See De Vos, *Regsgeskiedenis*, 232.

⁵⁸² See for more details Visagie, *Regspleging*, 32-36 and 65-68; De Wet, *THR-HR 21* (1958), 93-95; La Bree, *Rechterlijke Organisatie te Batavia*, 63-68; Sirks, *Legal History* 14 (1993), 106-107; Van Zyl, *Geskiedenis*, 434-437; Hosten *et al*, *Introduction*, 342; Hahlo and Kahn, *Union*, 15 and *Legal System*, 574.

⁵⁸³ See La Bree, *Rechterlijke Organisatie te Batavia*, 64. Sirks, *Legal History* 14 (1993), 106. For biographical details see Stapel, *Gouverneurs-Generaal van Nederlandsch Indie*, 29-30 and De Wet, *Ou Skrywers*, 12-13; De Vos, *Regsgeskiedenis*, 231-232.

⁵⁸⁴ The wording of the original Statutes are included in Van der Chijs *Nederlandsch-Indisch Plakaatboek*, 472 *et seqq.*

⁵⁸⁵ Visagie, *Regspleging*, 33; Hahlo and Kahn, *Union*, 15; Stock, *SALJ* 15 (1932), 330.

Matsuycker drafted a number of new regulations, among them a *Maniere van Procedeeren voor de Collegien van Justitie tot Batavia* (manual for the proceedings before the Courts of Justice at Batavia). The whole served as a basic code until 1766. What was not covered by the code was to be judged according to the law in the Netherlands. The Statutes were promulgated on 8 July 1641 by Governor-General Antonio van Diemen and took effect from 1 January 1642.

It must be noted, however, that the Governor-General at Batavia was hardly empowered to enact new laws. The famous *Octrooi* from 1602 made by the Estates-General, the supreme governing body of the Low Countries which chartered the VOC, never conferred legislative powers on the various bodies of the VOC. Thus, strictly speaking, the *heeren seventien* and the councils of the *comptoirs* were not entitled to pass any legislation.⁵⁸⁶ Nevertheless, D H van Zyl has argued that the lack of formal consent of the Estates-General was made up for by “...’n *stilswyende goedkeuring*...” since the Estates-General never objected to the local enactments at Batavia.⁵⁸⁷ This argument is confirmed by a brief remark at the very end of the introductory chapter to the original Statutes of India from 1641. The passage shows that the Batavian local authorities were well aware of the need to receive some kind of approval, either open or tacit, by the Estates-General:

“Ende alles by provisie [the validity of the Statutes of India], ende tot dat by d’Heeren onse principalen met autorisatie ofte approbatie van de Ho. Mog. Heeren Staten Generael nader reglement op de regering van India geraempt ende overgesonden sal worden.”⁵⁸⁸

Nevertheless, the validity of the Statutes was probably confirmed by customary use of the enactment in Batavia and the numerous *buitencomptoiren*.⁵⁸⁹ These Statutes of India were also applied at the Cape. Although formal adoption of the Statutes took place only in 1715, court records indicate that as early as 1656 reference was made to the Statutes of India in the Cape Court of Justice.⁵⁹⁰ In February 1715, the Political Council decided: “...dat voortaan omtrent de

⁵⁸⁶ De Wet, *THR-HR* 21 (1958), 94; Visagie, *Regspleging*, 33 *et seq* and 66 *et seq*; Van Zyl, *Geskiedenis*, 433–437. Accordingly the recommendation of the *heeren seventien* from 4 March 1621 to administer the law primarily in accordance with the laws of the Province of Holland is also questionable. See Hosten *et al*, *Introduction*, 341; Van Zyl, *Geskiedenis*, 438. See also *Rex v Harrison and Dryburgh* 1922 AD 320 at 333.

⁵⁸⁷ Van Zyl, *Geskiedenis*, 435.

⁵⁸⁸ See Van der Chijs, *Nederlandsch-Indisch Plakaatboek*, 473. It is interesting to note that none of the relevant modern authors have referred to this detail.

⁵⁸⁹ Sirks, *Legal History* 14 (1993), 108.

⁵⁹⁰ Van Zyl, *Geskiedenis*, 437; Visagie, *Regspleging*, 65; Hosten *et al*, *Introduction*, 342; Botha, *Common and Statute Law*, 42–45.

regts en gedingzaken, de Statuten van India zullen gevolgt werden..."⁵⁹¹ Only in peculiar local conditions were the Batavian regulations non applicable.

Considering these general facts on the interaction of the Batavian Statutes and the law at the Cape, it remains to be asked whether Sir John was correct in stating that the Statutes of India contained a provision introducing the concept of leave to sue. From an anonymous hand-written copy of the Statutes of India at the Library of the Cape of Good Hope Provincial Division at Cape Town, it is evident that the Statutes indeed included such a concept. Under Art 36 of the chapter *Van de Justitie*, we find the following regulation together with the annotation *Oude Statut* (initial Statutes of India):

"Dog t'Lands Oveheid de Leeden van den Raad van Justitie en Scheepenen, mitsg[...]aer de resp. Officieren van Justitie, zal niemand voor't Recht betrekken ten zij met special consent, gelyk ook niemand zyne Oudere nogte zyne gewezene Lyfherren ofie Vrouwen op 35 reaalen boeke."

The section is followed by other regulations that have later dated annotations. For example, Art 37 which regulates the requirement of obtaining *venia agendi* in order to sue a member of the clergy is dated 18 August 1729. The date of Art 38 dealing with *venia agendi* of court officials is dated sometime in 1737. The fact that Art 36 must have been included under Matsuycker's initial version of the Statutes is not only evident from the annotation *Oude Statut*, but also by comparison of the Cape Town copy with the original text of the Batavian Statutes. Article 2 of the chapter *Maniere van Procedeeren voor de Collegien van Justitie tot Batavia* of the original Batavian Statutes states:

*"De Lantoverheyt, die van de Raede van Justitie ende den gerechte, mitsgaders oock de respective Officieren, en sal niemant voor recht betrecken, ten sy met speciael consent, gelyck oock niemant syne ouders, nochte syne gewesene lyffheer ofie vrouwe, op 25 reaalen van achten."*⁵⁹²

Since no sufficient reason for the application of the above-mentioned saving clause can be identified, it is fair to conclude that the concept of leave to sue was introduced to the Cape via the Batavian Statutes. It must have been Jan Matsuycker who, for whatever reason, included this procedural privilege in the original Statutes.

In incorporating this privilege, Matsuycker appears to have been inspired by the Roman and Roman-Dutch law with regard to the so-called *venia agendi*. Although Roman-Dutch law did not provide for procedural privilege for magistrates, it took over the Roman concept of *venia agendi*. As we now know, *venia agendi* was necessary, for example, in cases when children

⁵⁹¹ Quoted at Visagie, *Regspleging*, 66; Botha, *Common and Statute Law*, 46.

⁵⁹² Included in Van der Chijs, *Nederlandsch-Indisch Plakaatboek*, 498.

intended to sue their parents or when a wife wished to sue her husband.⁵⁹³ Undoubtedly, Matsuycker must have had *venia agendi* in mind when he drafted Art 2 of the Batavian *Maniere van Procedeeren*. This is particularly apparent from the alternative formulation “...gelyck oock niemant syne ouders...”; it is further apparent, from the fact that, similar to a child’s not suing his *ouders*, a former slave was not permitted to sue his former master or mistress without consent: “...nochte syne gewesene lyffheer ofte vrouwe...”.⁵⁹⁴ The creative part of Matsuycker’s approach was, first, that Batavian law, unlike Roman and Roman-Dutch law, covered administrative, judicial and religious authorities as well as martial authorities under the concept of *venia agendi*.⁵⁹⁵ Secondly, unlike their counterparts in Roman law, Batavian magistrates of any rank including judges enjoyed this procedural privilege.

This extensive procedural privilege was intended to protect the status of various authorities within Dutch colonial society: former slave owners, parents and husbands; as well as high political officers and administrators, including the clergy and judges. The group of administrative, judicial and religious authorities was a particularly small and exclusive set of Dutch colonial notables within colonial society at large.⁵⁹⁶ The cream of colonial society at

⁵⁹³ See above chapter II 4. And note Van der Linden, *Institutes of Holland*, 3.1.2.3: “If children conceive that they have any right of action against their parents, they must first apply to the court for leave to sue them; which leave is termed *venia agendi*.” Further see Merula, *Manier van Procederen*, 4.24.12.2: “Alle Private Persoonen, tegens dewelke iemand eenige Actie heeft uitstaande, mogen...in Rechte betogen worden.” And 4.24.12.3: “Uitgenomen zommige, die men niet mag dagen, dan...met Limatie. In welker getal eerst verschynen des Anlegers of Klagers Ouders, Vader en Moeder...Deeze (als ook deszelfs Leenheer...) mag men in Recht niet roepen absque *venia* [Annotation [c]: *venia agendi* genoemt] zonder voorgaande Consent en permissie van den Juge.” The records of the National Archives provide for numerous examples of woman trying to obtain *venia agendi* for actions against their husbands. See for instance at C.J. No. 2510, 84; C.J. No. 2511, 11; C.J. No. 2515, 276; C.J. No. 2522, 237: “*Jacoba Bezuidenhout verzoekt veniam agendi om tegens haaren man Abraham Visser tot dissolutie van het huwelijks band te moegen procederen.*”

⁵⁹⁴ Even though it appears that the Roman-Dutch writers had more in mind the ancient feudal relationship between *Leenheer* and his *Vasal*. See Merula, *Manier van Procederen*, 4.24.12.3 Annotation [b].

⁵⁹⁵ For us today a distant cry from the past. However, in seventeenth and eighteenth century Europe the subordinate position of a wife to her spouse was common practice. J Voet can be cited as follows: “Among us she [the wife] is so far brought by marriage under a marital power enlarged to an almost boundless scope as to be constrained through such power by a chain as tight as or tighter than ties of paternal power by which sons of a family are bound...”. Furthermore see his *Commentary* at D 2.4.10.

⁵⁹⁶ For a telling description of colonial society at Batavia in the second half of the seventeenth century see Blussé, *Strange Company*, 73, 78 *et seqq*, 172 *et seqq*; Taylor, *Social World of Batavia*, 14 *et seqq*. For an account of the personal relationships at the top of Batavian society and the nepotism in the middle of the eighteenth century see Sirks, *Legal History* 14 (1993), 109-110. A description of the state of Dutch colonial society at the Cape is provided in Valentyn, *Beschrywing van de Kaap der Goede Hoop*, 171-175. Also Schutte, *Company and Colonists, at the Cape*, 292-298. For a later period see Dooling, *Law and Community*. See also Botha, *Social Life*, 146-196.

Batavia has been described as new male VOC officials arriving from Europe and establishing themselves by marrying daughters or widows of those already established there. Transfer of office was predominantly within the widespread family units. This social elite was tremendously rich, partly due to profitable marriages, partly due to illicit trade profits.⁵⁹⁷ Little wonder that whoever entered this close-knit group was inclined to preserve and protect the profitable *status quo*.

4 2 3 Conclusions

The modern concept of leave to sue in s 25 of the Supreme Court Act of 1959 and s 5 of the Constitutional Court Amendment Act of 1995 is rooted in the mid-seventeenth century Batavian provision of *venia agendi*. However, this concept was not free from change over the centuries of its application.

Variations already appear in the differences between the original Batavian Statute and the handwritten copy in use at the Cape. Unlike their counterparts in Batavia, *schepenen* (*landdrosten*) were expressly protected by the regulations at the Cape. Furthermore, the Cape privilege applied indefinitely, and specific rules as to the procedure to petition for *venia agendi* existed. When the concept of leave was incorporated in rule 9 of the Cape Rules of Court, further changes took place. First, inferior judges no longer enjoyed this procedural privilege. Secondly, the concept applied only during the term of the judge's office. Thirdly, the privilege lost much of its social impetus as a protective shield for colonial notables: only the governor, his deputy and the members of the superior judiciary were to be included. Leave to sue came to be based on considerations of legal policy where it was considered an effective means to protect the dignity of judicial office from frivolous and vexatious actions. However, this was by no means a guarantee that post-1828 courts considered applications for leave to sue with much objectivity.⁵⁹⁸ Finally, under s 25 (1) of the Supreme Court Act of 1959, it was the judiciary which remained exclusively protected by leave to sue. The state president as successor to the governor was no longer included under s 25 of the Act.⁵⁹⁹

⁵⁹⁷ Taylor, *Social World of Batavia*, 14 and 78-79.

⁵⁹⁸ As appears from the Natal case *Tilonko v The Governor* (1908) NLR 70 at 73-74 where a full bench held that: "They [the Natal Rules of Court] certainly never contemplated taking proceedings against a judge of this court for acts which he has done as a judge." Further, it was held: "...the application under all circumstances, is ridiculous." And: "It seems to me nothing short of astonishing that such an application should seriously have been made to this Court."

⁵⁹⁹ For a discussion whether this was merely a *casus omissus* see Riekert, *THR-HR* 41 (1978), 430-431.

The concept of leave to sue had its origin in the Batavian Statutes of 1642 and was not rooted in the English constitutional doctrine of crown immunity, as has been suggested. It serves as an as yet unknown example of a concept which is of neither English nor Roman-Dutch, but of Batavian-Cape-Dutch origin. In this sense, the concept is unique not only in the procedural law of South Africa, but in the country's legal order as a whole.

4.3 A future for leave to sue in South African law?

In the context of modern law, it is submitted that leave to sue as an additional procedural requirement to sue a judge is not consistent with s 34 of the Constitution of 1996. This view may draw fierce criticism from the ranks of the judiciary, but there is good reason for speaking out against retention of this out-dated concept.

According to the wording of s 25 of the Supreme Court Act of 1959 and s 5 of the Constitutional Court Complementary Act of 1995, leave to sue a judge must be obtained from the court of the would-be defendant judge or the President of the Constitutional Court. If the latter is to be sued, consent must be obtained from the Chief Justice. Section 25 makes it further clear that no inferior court may direct an issue of summons or a *subpoena* against a judge. Application for leave to sue, in practice, is not by way of notice of motion, but is an informal application with notice to the judge concerned.⁶⁰⁰ In a 1985 Botswanian case, *Ngope v O'Brien Quinn*, Trollip AJ held that a court must be "...apprised of the facts relating to the would-be plaintiff's alleged cause of action to enable it to decide whether or not to grant the requested leave to sue."⁶⁰¹ Legal writers have argued that an application will fail unless the prospective plaintiff can establish good cause. What amounts to good cause, however, depends on the circumstances of each particular case.⁶⁰²

The question remains as to whether this does not deprive a person who suffers damage at the hands of a judge from direct and immediate access to the courts for redress, as has been legislated in s 34 of the Constitution? Is leave to sue not a further and unnecessary fetter on a would-be plaintiff?

⁶⁰⁰ Harms, *Civil Procedure*, 63.

⁶⁰¹ Botswanian High Court cases 123/85 and 1/86, unreported.

⁶⁰² Erasmus, *Superior Court Practice*, Service 3, 1995, A1-76; Nathan and Barnett, *Rules of Court*, 618.

The right of access to courts is contained in chapter 2 of the Constitution of 1996, the so-called Bill of Rights. The Bill of Rights “...enshrines and entrenches the fundamental human rights and freedoms of subjects of the state, which are protected against infringement.”⁶⁰³ According to s 34:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

The right of access to court, however, is not entirely free from limitation. Section 34 is no exception to limitation in terms of s 36, which contains a general limitation clause that applies to all constitutional rights, including the Bill of Rights.⁶⁰⁴ With regard to leave to sue, it might now be asked whether s 25 of the Supreme Court Act of 1959 and s 5 of the Constitutional Court Complementary Act of 1995 are laws of general application which limit s 34 of the Constitution in a reasonable and justifiable way. If the two provisions do not comply with the limitation test, they must be considered unconstitutional and void. In order to assess the constitutionality of the limitation of a constitutional right, s 36 refers to an additional five factors which supplement the initial two-tiered test of reasonableness and justifiability.⁶⁰⁵ The following discussion is based on the scheme of this test.

4 3 1 Law of general application

According to s 36 (1) of the Constitution, a legal right may be limited only by a law of general application. A law in this sense includes legislation, common law and customary law.⁶⁰⁶ Section 25 of the Supreme Court Act of 1959 and s 5 of the Constitutional Court Complementary Act of 1995 are, therefore, laws of general application.

⁶⁰³ Section 7 of the Constitution. See Basson, *Interim Constitution*, 13.

⁶⁰⁴ The literature on the limitation clause is vast. For a detailed account (predominantly still with respect to the Interim Constitution) see Erasmus, *Limitation*, 629-654, Du Plessis and Corder, *Bill of Rights*, 122-128 and Basson, *Interim Constitution*, 50-54. A more recent contribution on the provisions of the final Constitution is provided by Woolman, *SAJOHR* 13 (1997), 102-134. While making use of publications dealing with the limitation clause of the Interim Constitution (s 33) it has to be realised that two essential aspects have been removed from the limitation clause of the final Constitution, i.e., the so-called ‘necessary-requirement’ and the passage that stated that no limitation ‘shall negate the essential content of the right’.

⁶⁰⁵ Rautenbach and Malherbe, *Constitutional Law*, 311 and 313.

⁶⁰⁶ *Ibid.* at 311.

4 3 2 The nature of the right

The first factor to be determined is what right is protected by s 34 and how important s 34 is in an open and democratic society.⁶⁰⁷

Under the closed and undemocratic system of the apartheid regime, free and unrestricted access to courts was often barred.⁶⁰⁸ Various fundamental rights of procedure were unprotected. To prevent once and for all any future abuse, s 34 of the Constitution protected the right to unrestricted access to the courts and provided for fair public hearings. Section 34 must be read in conjunction with s 8 (1) and s 35 (3) of the Constitution which guarantee equal protection of the law and the right to a fair trial. More precisely, this implies the following:⁶⁰⁹ Section 34 obliges the government to establish a system of courts and tribunals as well as to provide for their continuous functioning.⁶¹⁰ Free access to courts further guarantees rights in regard to the nature of court proceedings and the procedure to be followed, in other words a fair and public trial. This also applies to civil litigation, although there exists some uncertainty as to the precise scope of this right.⁶¹¹

Enshrinement of the right to a fair trial eliminated the infamous ouster clauses of the apartheid age which restricted the courts' jurisdiction in certain matters and, consequently, barred access to the courts.⁶¹² In *Besserglik v Minister of Trade* and *Bernstein v Bester*, it was argued by the applicants that access to the courts includes the right to have disputes determined by a court of law until final determination which, *inter alia*, would include a right of appeal.⁶¹³ Although O'Regan J expressed some doubts about the correctness of this interpretation, it has not yet been expressly rejected.⁶¹⁴ In *Mohlomie v Minister of Defence*, a time limit of six months for the

⁶⁰⁷ Woolman, *SAJOHR* 13 (1997), 110.

⁶⁰⁸ Generally the question of access to court can be seen in a broader context, i.e., access to justice. For details see Cappelletti, *SALJ* 109 (1992), 22. Further note Erasmus, 1996 *Consultus*, 105-107.

⁶⁰⁹ See generally Rautenbach and Malherbe, *Constitutional Law*, 218; Rautenbach, *Bill of Rights*, 65-67 and 129; Basson, *Interim Constitution*, 32-33; Du Plessis and Corder, *Bill of Rights*, 163; Beukes, 1997 *Consultus*, 130; Loots, *Access to Courts*, Original Service, 1995, 8-1; Erasmus, *Superior Court Practice*, Service 6, 1996, A2-44-46.

⁶¹⁰ Known in German constitutional law as so-called *Justizgewährungsanspruch*. See *Bernstein v Bester* NO 1996 (4) BCLR 449 (CC), 1996 (2) SA 751 (CC) para 51.

⁶¹¹ Rautenbach and Malherbe, *Constitutional Law*, 219-220.

⁶¹² See above at 1 2 2 1. Further see Basson, *SAJOHR* 3 (1987), 28-43.

⁶¹³ 1996 (6) BCLR 745 (CC) para 10; and 1996 (4) BCLR 449, 1996 (2) SA 751 (CC) para 102-106, respectively.

⁶¹⁴ *Besserglik v Minister of Trade* 1996 (6) BCLR 745 (CC) para 10.

institution of actions in terms of s 113 (1) of the Defence Act of 1957 was considered inconsistent with the right of access to courts.

Access to courts further includes the right to have justiciable disputes settled by an independent court. This principle does not only protect the courts against outside interference. It also provides the individual with a claim *vis-à-vis* the courts in respect of independence and impartiality. This includes *inter alia* the rule that a presiding officer has to recuse himself if there is suspicion that he is biased.⁶¹⁵ It is important to note that free access to court is not necessarily restricted to courts in a narrow sense, but also applies to other independent and impartial bodies such as the various tribunals referred to above.⁶¹⁶

4 3 3 Importance of the purpose of the limitation

Limiting provisions must also promote or protect a permissible or lawful public interest.⁶¹⁷

For close to 170 years, leave to sue has received unanimous approval in the South African case law and jurisprudence. Arguments in favour of the concept have centred around two policy aspects: On the one hand, the purpose of leave to sue was to ensure that “...because of the important, responsible and respected office of a Judge...he should not be subjected to or harassed by trivial, vexatious, or unsubstantial civil lawsuits which have no chance of succeeding.”⁶¹⁸ On the other hand, leave to sue was said to be aimed against improper interruption of the courts’ functioning, which could occur if judges had constantly to defend themselves in court actions.⁶¹⁹ Both arguments, the protectional and the functional, make reference to particular public interests, namely the integrity, dignity and efficient functioning of the judiciary. Undoubtedly these are important interests worthy of preservation in a democratic and open society.⁶²⁰

⁶¹⁵ *S v Collier* 1995 (8) BCLR 975 (CC). See also Rautenbach and Malherbe, *Constitutional Law*, 218-219.

⁶¹⁶ See above 1 2 1 3 and recently Beukes, 1997 *Consultus*, 130-131.

⁶¹⁷ Woolman, *SAJOHR* 13 (1997), 110-111.

⁶¹⁸ Summarised *per* Trollip AJ in *Ngobe v O'Brien-Quinn* Botswanian High Court cases 123/85 and 1/86, unreported. Quoted from Othlhogile, *LLJ* 7 (1991), 110. Further *Ex parte Aaron* 1904 TS 487 at 489. See also Erasmus, *Superior Court Practice*, Service 3, 1995, A1-76; Nathan and Barnett, *Rules of Court*, 618; Harms, *Civil Procedure*, 63; Boule *et al*, *Constitutional and Administrative Law*, 203-204; Herbstein and Van Winsen, *Civil Practice*, 426; Herbstein and Diemont, *Superior Court Practice*, 43; Anders, *SALJ* 27 (1910), 245.

⁶¹⁹ Erasmus, *Superior Court Practice*, Service 4, 1995, A3-3.

⁶²⁰ The merits of these purposes will be discussed below at 4 3 6 1 and 4 3 6 2.

4 3 4 The nature and the extent of the limitation

The next step must be to establish to what extent the interests protected by s 34 of the Constitution are affected by s 25 of the Supreme Court Act of 1959 and s 5 of the Constitutional Court Complementary Act of 1995. In other words, one has to:

“...place the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement...on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds for justification must be.”⁶²¹

Leave to sue is a preliminary petition procedure which regulates access to court with respect to actions against a superior court judge. It has been argued that leave to sue is no different from any other rule requiring a litigant to proceed in court by one form of action or another. Therefore, leave to sue has been considered an adequate tool in the hands of the judiciary. It has been contended that criticism would elevate a mere procedural rule to the status of substantive law.⁶²²

A more cautious approach, however, is advisable. Not every procedural rule is similar. Most procedural rules aim merely to regulate the functionality of court procedures.⁶²³ Some procedural rules, however, have serious consequences for the litigating parties. The different ‘leave to’ regulations in South African procedural law, namely leave to appeal as well as leave to sue, are examples of the latter.⁶²⁴ In both cases, plaintiffs or prospective plaintiffs may have to face the hardship of denial of further or even initial legal steps before a court. Without having as yet assessed the admissibility of the regulations contained in s 25 of the Supreme Court Act of 1959 and s 5 of the Constitutional Court Complementary Act of 1995, it is evident from an objective point of view that in both instances there are, inevitably, drastic consequences for the legal position of the parties.

4 3 4 1 *The Constitutional Court’s decision in Besserglik and its relevance to the concept of leave to sue*

The constitutionality of the concept of leave to appeal in terms of s 20 (4) (b) of the Supreme Court Act of 1959 was in 1996 the subject of a Constitutional Court decision in *Besserglik v Minister of Trade, Industry and Tourism*.⁶²⁵ The court rejected the argument that leave to appeal

⁶²¹ *S v Gwadiiso* 1995 (12) BCLR 1579 (CC) para 18. Further Woolman, *SAJOHR* 13 (1997), 110.

⁶²² Othlhogile, *LLJ* 7 (1991), 118.

⁶²³ For instance, rules with regard to evidence, pleadings, court sittings, etc.

⁶²⁴ The procedures with regard to leave to appeal are generally contained under ss 20 and 21 Supreme Court Act of 1959.

⁶²⁵ 1996 (6) BCLR 745 (CC).

and the required petition procedure infringed sections 22 and 8 (1) of the Interim Constitution of 1993.⁶²⁶ With regard to s 22, it was held by the court that a screening procedure which excludes unmeritorious appeals cannot be considered a denial of a right to access to a court as long as the screening procedure enables a higher court to make an informed decision as to the prospects of success.⁶²⁷

This argument does not fully address the problems connected with s 25 of the Supreme Court Act of 1959 and s 5 of the Constitutional Court Complementary Act of 1995. Neither the Constitutional Court Complementary Act nor the Supreme Court Act provide for the safeguard of an additional petition procedure, there being no possibility whatsoever for a would-be plaintiff to have a denial of leave to sue reconsidered by a higher court. Hence, the central argument in *Besserglik* does not apply directly here.

The same argument shows to what degree ss 25 and 5 limit the right of free access to courts since they deny a prospective plaintiff an elementary procedural right: the right to review.⁶²⁸ This right would only be available to a party that succeeded in obtaining leave to sue.

4 3 4 2 Procedure with respect to recusal and review

Other aspects also show how severely s 34 of the Constitution is infringed by the two limitations presently under review. It is noteworthy that South African procedural law does not afford a similar far-reaching immunity to the judiciary with regard to either judicial recusal or judicial review. In the former instance, a litigant might institute procedures in order to have a judge recuse himself from a case when there is reasonable ground for suspicion of bias on the part of the judge, without an obligation to petition for leave first.⁶²⁹ In addition, according to s 24 (1) (b) and (c) of the Supreme Court Act of 1959, the proceedings of any inferior court may be brought under review on the grounds of interest in the cause, bias, malice or corruption on the part of the judicial officer, as well as in cases of gross irregularity during the proceedings.

⁶²⁶ Predecessors of s 34 and s 9 (1) of the Constitution of 1996.

⁶²⁷ *Besserglik v Minister of Trade, Industry and Tourism* 1996 (6) BCLR 745 (CC) para 9 and 10.

⁶²⁸ De Vos, 1991 *TSAR*, 369.

⁶²⁹ See *Mönning and Others v Council of Review and Others* 1989 (4) SA 866 (CC); *S v Malindi* 1990 (1) SA 962 (A) affirming *S v Radebe* 1973 (1) SA 796 (A). Further note Boule *et al*, *Constitutional and Administrative Law*, 204; Van Dijkhorst, *Courts*, 98.

If one argues that leave to sue proceedings harm the integrity and dignity of the judicial office, it is submitted that the same applies to recusal and review proceedings. This is particularly evident from analysing the relation of review procedures and proceedings against a judge in delict for which leave to sue is necessary. From what has been said in the previous chapter, it is evident that at present a successful claim in delict against a judge requires proof of malice on the part of the judge. That these criteria are identical in review proceedings shows how closely related these proceedings are. Therefore, it is generally feasible that, at least in the cases of bias, malice or corruption, an action in delict could be considered concurrently with ordinary review procedures. In both instances, the accusation against the judge is identical in principle. However, it is only with regard to leave to sue that the protection argument is raised to justify a limitation of access to the courts.

The weakness of the protection argument is further evident from a second aspect. Quite apart from instances of delictual claims against a judge, which are based on the judge's performance in court, one can identify various other cases where leave to sue must be obtained. Reference might be made in this regard to the case of a judge's spouse who wants to sue for divorce or the case of a judge who has failed to pay for a car he or she bought. It is submitted that in these cases the anticipated harm to the judiciary's integrity or dignity is not nearly as serious as in the case of recusal and review. The fact remains, however, that with regard to recusal or review an aggrieved party enjoys unrestricted access to court in order to have the consequences of a judge's misconduct redressed. It is clear that South African law is not consistent in its approach to the various problems discussed.

4 3 4 3 *Legal uncertainty*

Another aspect of concern in dealing with the aspect of the nature and extent of the limitation, is the lack of clarity in the relevant sections.⁶³⁰ What exactly is considered sufficient ground for granting leave to sue? Secondary sources advise that "...good cause would have to be shown in an application for leave to sue." And further: "What amounts to good cause depends upon the circumstances of each case."⁶³¹ This is a hollow phrase. In an early case, *Tilonko v The Governor*, Bale CJ held that no leave to sue would be granted unless the court were satisfied that

⁶³⁰ For the use of the term legal certainty/uncertainty see Beukes, 1997 *Consultus*, 131.

⁶³¹ Erasmus, *Superior Court Practice*, Service 3, 1995, A1-76; Nathan and Barnett, *Rules of Court*, 618.

a *prima facie* case had been made out.⁶³² Section 25 of the Supreme Court Act of 1959 and s 5 of the Constitutional Court Complementary Act of 1995 are completely silent on this important question. They do not even contain a reference to a *prima facie* case. No safe guidelines exist that would enable a would-be plaintiff to assess objectively what his chances are of obtaining leave to sue.

Secondly, it is totally unclear from the wording, at least of the Supreme Court Act, who in the end grants leave to sue.⁶³³ From the *Tilonko* case it is evident that two of the three judges who constituted the court *a quo* also sat on the Bench of the second suit where the plaintiff tried to obtain leave to sue in respect of the first trial!⁶³⁴ The wording of s 25 of the Supreme Court Act of 1959 does not exclude such a possibility. It only refers to the fact that: “...no summons...shall in any civil action be issued...except with the consent of *that court*...”.⁶³⁵ What this means is unclear. Is reference made to the court the judge belongs to? If so, who sits on this court? Will only the judge president or rather a full court of the division be involved? Or, will there be a judge president or will a full court of a second division or the Chief Justice or even the President of the Constitutional Court be called to grant leave to sue? Considering the weight of the fundamental right entrenched under s 34 of the Constitution, it is clear that this is an untenable situation. It promotes legal uncertainty of the first order.

4 3 4 4 *Other considerations*

Only superior court judges are protected by the preliminary procedural safeguard under discussion here. Even though South African judges might not enjoy the same reputation as they did 30 years ago, the judiciary is still in an elevated position. There remains a considerable reluctance to criticise, let alone to sue a member of the superior judiciary. Taking this into account, one may safely assert that the obligation to obtain preliminary leave to sue increases existing psychological inhibitions, a point which clearly relates to the question of access to court.

⁶³² (1908) NLR 70 at 73.

⁶³³ From s 5 Constitutional Court Complementary Act of 1995 it is evident that the President of the Constitutional Court grants leave to sue against an ordinary Constitutional Court judge. With regard to the President of the Constitutional Court the Chief Justice grants leave to sue.

⁶³⁴ (1908) NLR 70 at 73-74.

⁶³⁵ My italics.

A final criticism that must be made is that the present concept of leave to sue conveys to would-be plaintiffs, and not only to them, the feeling that South Africa's superior judiciary resembles a distinct caste within society who, as soon as their own interests are at stake, withdraw into their snail-shells and protect themselves by a set of restrictive regulations. The superior judiciary at present enjoys not only considerable immunity from action in substantive law, which is technically very difficult to overcome, but shields itself by means of leave to sue.

Add to this that – despite the validity in South African law of the maxim that no-one shall be judge in his own case (*nemo iudex in sua causa*) – it is the judiciary itself which decides whether leave to sue will be granted against a brother or sister on the Bench. The lack of clarity on how the court granting leave to sue is constituted only intensifies these misgivings. Access to courts as entrenched under s 34 of the Constitution creates *inter alia* a platform for a constitutional guarantee concerning fair trial and the protection of fundamental procedural rights. It also provides the individual with a claim *vis-à-vis* the courts that the latter function independently and impartially.⁶³⁶ The proverb 'Dog does not eat dog' probably describes best why the essential procedural rule embodied in the above-mentioned maxim mentioned should also apply to leave to sue proceedings.

4 3 5 The relation between the limitation and its purpose

Having assessed the overall legitimacy of the purpose of the limitation of suing judges⁶³⁷ in s 25 of the Supreme Court Act of 1959 as well as s 5 of the Constitutional Court Complementary Act of 1995 it must be determined whether the two provisions in reality promote the purpose of the limitation.⁶³⁸

From a practical point of view, it may be said that the procedural privilege included in both sections presently under review does promote the purpose of the limitation, i.e., there have hardly been any actions against judges reported the past decades.

⁶³⁶ Rautenbach, *SA Bill of Rights*, 66.

⁶³⁷ See above at 4 3 3.

⁶³⁸ Woolman, *SAJOHR* 13 (1997), 110.

4 3 6 Less restrictive means to achieve that purpose

Finally, the constitutionality of the two sections in question might be assessed by asking whether the purpose of the sections could not have been served equally effectively in their absence or by equally effective alternative measures. In other words, we have to strike a balance between two competing rights and interests.⁶³⁹ The existence of such alternatives would be strong indication that the two sections restricting direct access to court are indeed excessive.

4 3 6 1 *Functioning of the courts*

Would unrestricted access to court in an action against a judge really prevent the courts from functioning properly? Examples from other legal systems such as those of Germany, the Netherlands, Belgium or even England show that actions against judges are highly exceptional, even though these countries do not have any procedural safeguard like South Africa's.⁶⁴⁰ In Canada, the majority of the annual 100 or so complaints against federal judges are concerned with the decision itself and not with complaints which could possibly give ground to an action in delict such as bias, or unbecoming conduct, or abuse of authority.⁶⁴¹ None of these countries has considered the adoption of any kind of procedural immunity in order to shield the functionality of their courts.

The most important argument against the functionality argument, meanwhile, can be found in South Africa itself where the Magistrates' Courts handle the vast majority of all court actions; in fact, by 1993 the figures reached over 95% of all criminal and civil matters.⁶⁴² The number of personal actions issued against magistrates is insignificant although the magistracy explicitly does not enjoy any kind of procedural immunity.⁶⁴³ Hence, it is unlikely that if leave to sue were

⁶³⁹ With regard to the various aspects of balancing see *ibid.* at 113-119.

⁶⁴⁰ As indicted earlier, there have been a number of actions in criminal law against former East-German judges and prosecutors. However, the vast majority of the cases lead to acquittal because most judges in former East-Germany did not violate fundamental principles of human rights. These verdicts of the *Bundesgerichtshof* have been received very critically. See for an overview see Hillenkamp, 1996 *JZ*, 181-182; Spindel, 1995 *JZ*, 375 *et seqq.* With regard to Belgium see Storme, 1993 *NJB*, 917 *et seqq.*, by the same author *Responsibility of the Judge*, 402 *et seqq.*; Kortmann, 1993 *NJB*, 920 *et seqq.* For the Netherlands see Winkel, *Responsabilité de Juges*. Recent cases in England are discussed above at chapter VI 4 1 4.

⁶⁴¹ See McQuoid-Mason, *Transformation*, 109-110.

⁶⁴² Fernandez, *Analysis and Critique*, 116; McQuoid-Mason, *Transformation*, 101 and 110; ICJ, *Report*, 114. See further South Africa: *Hoexter Commission 1983 Report*, IV 2.2.1.2.1.

⁶⁴³ No reported cases since 1977.

to be abolished as a requirement, South African judges would experience a flood of actions against them, with devastating consequences for the functioning of the superior courts.

4 3 6 2 *The judiciary's integrity and dignity*

It has also been argued that vexatious and hopelessly unfounded actions would harm the dignity and integrity of the judiciary. Therefore, the procedural immunity is necessary to filter out reasonable from unfounded actions. But would not a judiciary, which has nothing to fear from such actions and accordingly keeps the courts open for any conceivable action appear much more dignified in the eyes of the public when no claim succeeded even after say 100 actions? Would not those actions rebound on the quarrelsome litigants rather than on the judges?

Furthermore, in light of the degree of the substantive protection judges enjoy at present there appears to be no need for further procedural safeguard. The limitations of s 25 of the Supreme Court Act of 1959 and s 5 of the Constitutional Court Complementary Act of 1995, therefore, seem superfluous and unduly burdensome.

4 3 6 3 *Less restrictive means*

If one adheres to the view that leave to sue is a necessary means of achieving the purposes of upholding the integrity, dignity and functioning of the courts, it is submitted that there exist other effective but less restrictive means of doing so.

One alternative would be directed against one of the most crucial aspects of the present regulation, namely the fact that the judges themselves decide whether or not to grant leave to sue. One of the fundamental innovations in the structures of justice in the new democratic South Africa has been the introduction of the Judicial Service Commission (JSC). Reference has already been made to the crucial role this body plays with regard to the appointment and removal of superior court judges. These are two essential modes of judicial accountability.⁶⁴⁴ It would be feasible to assign to a subcommittee of this truly independent and impartial semi-legal body the right to grant leave to sue against a judge.⁶⁴⁵ Technically, this body should not have any difficulty in dealing with the questions that arise from such a petition. This alternative would,

⁶⁴⁴ See above at 1 2 2 2.

⁶⁴⁵ Note the composition of the JSC according to s 178 of the Constitution.

further, be in accordance with the creation of a balance between judicial independence and judicial accountability. It would free the judiciary from the odour of protecting their own.

Even if one believed that the body granting leave to sue under the present regulation would be constituted in a different manner from that in the infamous *Tilonko* case⁶⁴⁶ and would act fairly and impartially, considerations of justice speak against the present regulation. Justice not only has to be done, it has also to be seen to be done.⁶⁴⁷ Therefore, the public needs to be assured that absolute impartiality prevails also where the judiciary itself is concerned. This assurance can only be provided by a body which is not part of the judiciary. The JSC meets all the necessary requirements.

Finally, as the Constitutional Court pointed out in *Besserglik*, an essential requirement for assessing an infringement of s 34 of the Constitution is the question of whether or not a litigant has access to a higher court for review. Fairness of trial requires the additional and final possibility of an appeal against refusal of leave to sue – perhaps to a higher court or better to the full JSC.

4 4 Conclusion

Without doubt, the dignity and the integrity of the judges of the superior courts is of great importance to the proper and effective functioning of the judicial system in South Africa's new democratic society. These purposes require the protection of the legal order. Equally important to this aim is the support and protection of the functionality of the courts. Nonetheless, it is submitted that from the application of the general limitation test of s 36 (1) of the Constitution of 1996, it is evident that s 25 of the Supreme Court Act of 1959 and s 5 of the Constitutional Court Complementary Act of 1995 are not reasonable and justifiable limitations in an open and democratic society of the right of free access to the courts. The requirement of leave to sue, therefore, has to be considered an unconstitutional limitation of the fundamental right to unrestricted access to the courts which is entrenched under s 34 of the Constitution of 1996.

The obligation imposed on an individual seeking redress for judicial misbehaviour to obtain leave to sue prior to institution of a claim is overkill: the rights and interests of the judiciary are most effectively protected by a proper application of the restricted scope of the substantive law

⁶⁴⁶ See above at 3 2 2 1.

⁶⁴⁷ *R v Sussex Justices, ex parte Mc Carthy* (1924) 1 KB 256 per Lord Hewart.

of delictual liability. Beyond that, the existence of less restrictive or controversial alternatives such as the inclusion of the JSC into the procedures also shows that s 25 Supreme Court Act of 1959 and s 5 Constitutional Court Complementary Act of 1995 are unreasonable.

The concept of leave to sue has unique historical roots in South Africa's mixed legal system, which show to what extent this concept had its origins in a non-enlightened and undemocratic colonial class society. It can be historically explained. Today, however, it is outdated. The scant criticism that has been raised against this concept of what in fact is one leg of a double privilege is once again evidence of the predominantly uncritical approach by lawyers and other members of society towards the South African judiciary.⁶⁴⁸

In fact, there has been only one decision where a court approached critically the concept of leave to sue. The Botswanian case of *Ngobe v O'Brien-Quinn* is not authoritative in South African law since the court had to apply various provisions of Botswanian law which have no equivalent in South African law.⁶⁴⁹ It is worth noting, though, that on appeal a full Bench held that the Botswanian rule with regard to leave to sue, which had been interpreted by the court *a quo* as being equivalent to s 25 of the Supreme Court Act of 1959 (South Africa), constituted: "...an oppressive and gratuitous interference with the right of direct access to the courts....".⁶⁵⁰

It is submitted that the same applies to South African law. The retention of the concept of leave to sue is not in accordance with the concept of judicial accountability which is a necessary part of South Africa's open and democratic society. It is inconsistent with s 34 of the Constitution of 1996 and therefore should have no place in future South African procedural law.

⁶⁴⁸ References in Corder, *Judges at Work*, 232; Marcus, *SALJ* 100 (1984), 160-171; ICJ, *Report*, 109-114. See above at 13.

⁶⁴⁹ See Othlhogile, *LLJ* 7 (1991), 107; Redgment, 1987 *De Rebus*, 116. Botswana was made a British protectorate in 1885. By the Proclamation of June 10, 1891 Roman-Dutch law was adopted as the law of the protectorate.

⁶⁵⁰ *Per* Maisels P. Quoted from Othlhogile, *LLJ* 7 (1991), 119. It is interesting to note that two of the three judges, which heard the appeal, Maisels P and Van Winsen AJA, are South African lawyers. Further, Van Winsen some six years earlier sat as judge of the Cape Provincial Division on the case *Udwin v May* which on appeal was reversed by the Appellate Division. *Udwin v May* is the only case ever in South Africa where a judicial officer was held delictually liable although we have to remember that the decision was quashed on appeal.

5 SUGGESTIONS

In view of the preceding analysis of the modern South African law of judicial liability, this appears to be the appropriate place to introduce a number of suggestions for reform.

In cases of judicial liability for defamation or insult in court: the present law, as expounded by the Appellate Division in *May v Udwin*, should be retained.

With regard to judicial liability for wrong judgements: the law should be modified so that *dolus directus* on the part of the judicial officer must be proved on a balance of probabilities by the plaintiff to rebut the judicial officer's justification ground.

Leave to sue as incorporated in s 25 Constitutional Court Complementary Act of 1995 and s 25 Supreme Court Act of 1959 should be abolished. It ought to be possible to sue a judicial officer in any court like any other citizen in all actions, except actions for defamation or insult in court or wrong judgement. With regard to the latter, it must be ascertained whether:

- a.) In case of an alleged wrong judgement, the plaintiff has exhausted all possible legal actions against the judgement, i.e., appeal and/or review, without success.
- b.) Where appeal and/or review are unwarranted due to irreparable loss (eg., in the case of *Stump v Sparkman*) or in cases of defamation or insult in court, a petition to hear the case should be made to a subcommittee of the JSC, from which appeal would be to the 'full' JSC.

In the first instance, jurisdiction to hear the matter is to the next higher court. In cases of actions against judges of the Supreme Court of Appeal the matter is heard by the Constitutional Court and vice versa. In the second instance, the subcommittee of the JSC is chaired by a judge of the Supreme Court of Appeal and an additional four members, another judge, a senior magistrate, an advocate or an attorney and one lay member. Appeals are heard by the 'full' JSC under the chairmanship of the Chief Justice. He sits with six members, i.e., another judge, a magistrate, an advocate, an attorney and two lay members not involved in the previous hearing.